

(10)
No. 84-262-CFX
Status: GRANTED

Title: Mountain States Telephone and Telegraph Company,
Petitioner
v.
Pueblo of Santa Ana

Docketed:
August 13, 1984

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Krause, Kathryn Marie

Counsel for respondent: Hughes, Richard W.

Entry	Date	Note	Proceedings and Orders
1	Aug 13 1984	G	Petition for writ of certiorari filed.
2	Sep 14 1984		Brief of respondent Pueblo of Santa Ana in opposition filed.
3	Sep 13 1984	G	Motion of Atchison, Topeka and Santa Fe Railway Company for leave to file a brief as amicus curiae filed.
4	Sep 13 1984	G	Motion of Public Service Company of New Mexico for leave to file a brief as amicus curiae filed.
5	Sep 19 1984		DISTRIBUTED. October 5, 1984
6	Sep 27 1984	X	Reply brief of petitioner Mountain States Telephone and Telegraph Co. filed.
7	Oct 9 1984		Motion of Atchison, Topeka and Santa Fe Railway Company for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
8	Oct 9 1984		Motion of Public Service Company of New Mexico for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
9	Oct 9 1984		Petition GRANTED. The Solicitor General is invited to file a brief in this case expressing the views of the United States. Justice O'Connor OUT. *****
10	Nov 21 1984	G	Motion of Public Service Company of New Mexico for leave to file a brief as amicus curiae filed.
11	Nov 21 1984		Brief amicus curiae of Escondido, et al. filed.
12	Nov 21 1984		Brief amicus curiae of New Mexico filed.
13	Nov 23 1984		Brief amicus curiae of Atchison, Topeka & Santa Fe RR filed.
14	Nov 21 1984		Joint appendix filed.
15	Nov 23 1984		Brief of petitioner Mountain Sts. Telephone and Telegraph Co. filed.
16	Nov 28 1984		Brief amicus curiae of United States filed.
17	Dec 6 1984		Record filed.
18	Dec 6 1984		Certified C. A. proceedings received.
19	Dec 10 1984		Motion of Public Service Company of New Mexico for leave to file a brief as amicus curiae GRANTED. Justice O'Connor OUT.
21	Dec 10 1984		Order extending time to file brief of respondent on the merits until January 7, 1985.
22	Jan 4 1985		SET FOR ARGUMENT. Wednesday, February 20, 1985. (4th case.)
23	Jan 8 1985		LODGING received from Solicitor General.
24	Jan 7 1985		Brief amicus curiae of All Indian Pueblo Council, et al.

Entry	Date	Note	Proceedings and Orders
			filed.
25	Jan 7 1985	Brief amicus curiae of Pueblo of Taos filed.	
26	Jan 7 1985	Brief amicus curiae of Pueblo de Acoma filed.	
27	Jan 7 1985	Brief of respondent Pueblo of Santa Ana filed.	
28	Jan 9 1985	Lodging by respondent of manuscript, "Section 17 of the Pueblo Lands Act: A Study of Legislative History"	
29	Jan 9 1985	LODGINGS, with exhibits received from Richard W. Hughes.	
30	Jan 15 1985	CIRCULATED.	
31	Jan 18 1985	Record filed.	
32	Jan 18 1985	Record filed.	
33	Feb 12 1985	X Reply brief of petitioner Mountain Sts. Tel. filed.	
34	Feb 12 1985	Lodging received from William Allen.	
35	Feb 20 1985	ARGUED.	

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AUG 13 1984

ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1984

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

GILBERT M. WESTA, Esq.
KATHRYN MARIE KRAUSE, Esq.
931 - 14th Street, Suite 1300
Denver, Colorado 80202
(303) 624-2200

Attorneys for Petitioner

QUESTIONS PRESENTED FOR REVIEW

I. Whether the opinion below, invalidating rights-of-way granted over a period of thirty years under the sole authority of Section 17 of the Pueblo Lands Act, conflicts with decisions of this Court requiring deference to a reasonable administrative statutory interpretation in that:

A. The interpretation is manifestly supported by statutory provisions, gives meaning to each part of Section 17, and effectuated the intention of the Act;

B. The interpretation is consistent with this Court's construction of the Indian Non-Intercourse Act of 1834;

C. The interpretation comports with the legislative history of the Act, was adopted contemporaneously to the enactment of the Pueblo Lands Act and was consistently applied thereafter.

II. Whether the opinion below conflicts with decisions of this Court and other circuits in concluding that a quiet title consent decree settling title to real property interests is deprived of its *res judicata* effect solely because:

A. The consent decree entered more than 50 years prior to the present action does not state that the agreed to dismissal is "with prejudice";

B. A decision in the former action in favor of the party asserting *res judicata* arguably would have been erroneous.

LIST OF PARTIES

The names of all parties to this action are included in the caption.

LISTING OF PARENT COMPANIES, SUBSIDIARIES, AND AFFILIATES

The Mountain States Telephone and Telegraph Company (d/b/a Mountain Bell) is a wholly-owned subsidiary of Mountain Bell Holdings, Inc., which also owns Mountain Bell Technologies, Inc. U S West, Inc. is the parent corporation of Mountain Bell Holdings, Inc., and is also the parent corporation of the following subsidiaries, which are wholly owned:

BetaWest Properties, Inc.

LANDMARK PUBLISHING Company
U S WEST DIRECT Company

NetTech Communications Corporation

NewVector Communications, Inc.
NewVector Retail Service, Inc.

Northwestern Bell Corporation
Northwestern Bell Information Technologies, Inc.
Northwestern Bell Telephone Company

Pacific Northwest Bell Telephone Company
Comm+ Systems, Inc.

U S WEST Financial Services, Inc.

U S West Holdings, Inc.

U S WEST, Inc.

U S WEST Services, Inc.
d/b/a FirstTel Information Services, Inc.
d/b/a Interline Communication Services, Inc.

U S West Systems

TABLE OF CONTENTS

	Page
Question Presented For Review.....	i
List of Parties	ii
Listing of Parent Companies, Subsidiaries, and Affiliates	ii
Table of Contents	iii
Table of Authorities	v
Opinions	2
Jurisdiction Of This Court	2
Statutes Involved	2
Statement Of The Case	3
Reasons For Granting The Writ	7
I. The Tenth Circuit Opinion, In Voiding Rights- Of-Way Granted By Pueblos And Approved By The Secretary Of The Interior Pursuant To Sec- tion 17, Decides An Important Question Of First Impression Concerning A Federal Statute Which Has Not Been, But Should Be, Settled By This Court.	7
A. The Tenth Circuit Opinion Conflicts With The Language Of Section 17 And The Pur- pose Of The Pueblo Lands Act.	9
B. The Opinion Below Conflicts With Decisions Of This Court In Concluding That The Non- Intercourse Act Of 1834 Supports Invalida- tion Of Section 17 Rights-Of-Way.....	12
C. The Opinion Below Neglects To Consider That The Language Of Section 17 Is Con- sistent With The Congressional Intent To Allow Pueblo Conveyances With Secretarial Approval.	15
D. The Opinion Below Conflicts With The Rea- sonable Construction Given The Statute By The Administrative Agency Charged With	

TABLE OF CONTENTS—Continued

	Page
Its Enforcement For Over Thirty Years And Disregards Reliance By Grantees On That Construction.	17
II. The Opinion Below, In Holding That A Consent Degree Entered In A Pueblo Lands Act Quiet Title Suit Is Not A Final Judgment For Purposes Of Res Judicata Decides An Important Question Of Federal Law In A Manner Which Conflicts With Decisions Of This Court And Of Other Circuits.	22
Conclusion	26
Appendix:	
A. Opinion of the United States Court of Appeals for the Tenth Circuit in <i>Pueblo of Santa Ana v. The Mountain States Telephone and Telegraph Company</i> , No. 83-1220, Slip Opinion.	App. 1
B. Judgment and Opinion of the United States District Court for the District of New Mexico.	App. 14
C. Letter from Clerk of Tenth Circuit stating date of judgment.	App. 24
D. Pueblo Lands Act, Act of June 7, 1924, 43 Stat. 636	App. 25
E. Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177	App. 39
F. Lawsuits filed under Section 17 in District Court of New Mexico in December, 1982.....	App. 40

TABLE OF AUTHORITIES

CASES	Pages
<i>Administrator, Federal Aviation Administration v. Robertson</i> , 422 U.S. 255 (1975).....	11
<i>Alonzo v. United States</i> , 249 F.2d 189 (10th Cir. 1957), <i>cert. denied</i> 355 U.S. 940 (1958)	12
<i>American Equipment Corp. v. Wikomi Manufacturing Co.</i> , 630 F.2d 544 (7th Cir. 1980).....	24
<i>Angel v. Bullington</i> , 330 U.S. 183 (1947)	26
<i>Arizona v. California</i> , 460 U.S. 605, 103 S.Ct. 1382 (1983)	22
<i>Bowles v. Seminole Rock & Sand Co.</i> , 325 U.S. 410 (1945)	21
<i>Brunswick Corp. v. Chrysler Corp.</i> , 408 F.2d 335 (7th Cir. 1979)	24
<i>Chouteau v. Molony</i> , 16 How. 203 (1853)	8
<i>Heckman v. United States</i> , 224 U.S. 413 (1912)	27
<i>Johnson v. M'Intosh</i> , 8 Wheat. 543 (1823)	14
<i>Martino v. McDonald's System, Inc.</i> , 598 F.2d 1079 (7th Cir.), <i>cert. denied</i> , 455 U.S. 966 (1979).....	25
<i>McLaren v. Fleischer</i> , 256 U.S. 477 (1921).....	22
<i>Minnesota Co. v. National Co.</i> , 3 Wall. 322 (1865)	21
<i>Mitchel v. United States</i> , 9 Pet. 711 (1835)	14
<i>Morton v. Ruiz</i> , 415 U.S. 199 (1974).....	17
<i>National Life & Accident Ins. Co. v. Parkinson</i> , 136 F.2d 506 (10th Cir. 1943)	25
<i>Nevada v. United States</i> , — U.S. —, 103 S.Ct. 2906 (1983)	22
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U.S. 294 (1933)	21
<i>Patterson v. Lamb</i> , 329 U.S. 539 (1947)	17
<i>Piper v. Chris-Craft Industries, Inc.</i> , 430 U.S. 1 (1977)	21

TABLE OF AUTHORITIES—Continued

	Pages
<i>Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers</i> , 367 U.S. 396 (1961)	21
<i>Pueblo de San Juan v. United States</i> , 47 F.2d 446 (10th Cir.), cert. denied, 248 U.S. 626 (1931)	12
<i>Stuyvesant Insurance Co. v. Dean Construction Co.</i> , 254 F.Supp. 102 (S.D.N.Y. 1966) aff'd. sub nom, <i>Stuyvesant Co. v. Kelly</i> , 382 F.2d 991 (2d Cir. 1967)	25, 26
<i>Udall v. Tallman</i> , 380 U.S. 1 (1965)	21
<i>United States of America as Guardian of the Pueblo of Santa Ana in the State of New Mexico, v. Charles F. Brown, et al.</i> , Civil Action No. 1814 in Equity (D.N.M. 1927)	4, 22
<i>United States v. Candelaria</i> , 271 U.S. 432 (1926)	8, 14
<i>United States v. Clark</i> , 454 U.S. 555, 102 S.Ct. 805 (1982)	21
<i>United States v. Joseph</i> , 94 U.S. 614 (1877)	8
<i>United States v. Pico</i> , 5 Wall. 536 (1867)	8, 15
<i>United States v. Sandoval</i> , 231 U.S. 28 (1913)	8, 16
<i>United States v. Title Insurance & Trust Co.</i> , 265 U.S. 472 (1924)	21, 22
<i>Zenith Radio Corp. v. United States</i> , 437 U.S. 443 (1978)	22

STATUTES

<i>Act of June 30, 1834</i> , 4 Stat. 730, 25 U.S.C. § 177 (1970)	15
<i>Act of February 27, 1851</i> , 9 Stat 574	8
<i>New Mexico Enabling Act, Act of June 30, 1910</i> , 36 Stat. 557	8
<i>Pueblo Lands Act, Act of June 7, 1924</i> , 43 Stat. 636	passim

OTHER AUTHORITIES

	Pages
F. Cohen, <i>Handbook of Federal Indian Law</i> 387 (1942 ed., Univ. of N.M. Press Reprint)	8, 12
F. Cohen, <i>Original Indian Title</i> , 32 Minn. L. Rev. 28 (1947)	14
<i>The Legal Status of the Indian Pueblos of New Mexico and Arizona</i> , 57 I.D. 36 (1939)	12
LEGISLATIVE MATERIAL	
<i>H.R. Rep. No. 787</i> , 68th Cong. 1st Sess. (1924)	17

No. _____

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In The
Supreme Court of the United States
October Term, 1984

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THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,
Petitioner,

v.

PUEBLO OF SANTA ANA,
Respondent.

—o—

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

—o—

Petitioner, the Mountain States Telephone and Telegraph Company ("Mountain Bell"), respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered May 14, 1984.

OPINIONS BELOW

The United States District Court for the District of New Mexico granted summary judgment in favor of the Pueblo of Santa Ana ("Pueblo"), on June 2, 1982, entered on June 3, 1982, (App. B at 14) amended July 13, 1982, entered July 14, 1982 (App. B at 23), to allow for an interlocutory appeal. The opinion of the Court of Appeals for the Tenth Circuit affirming the District Court's grant of summary judgment in favor of the Pueblo was filed on May 14, 1984. (App. A at 1.) Both the District Court and Tenth Circuit Court Opinions are unreported.

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals for the Tenth Circuit was filed on May 14, 1984, and Judgment was entered the same day. (App. A at 1, and App. C at 24.) Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit exists by virtue of 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The following statutes are involved in the appeal:

Act of June 7, 1924, 43 Stat. 636.

Act of June 30, 1834, C. 161, Sec. 12, 4 Stat. 730, 25 U.S.C. § 177.

STATEMENT OF THE CASE

The Pueblo of Santa Ana, one of the numerous Indian Pueblos of New Mexico, brought this action for trespass which the Pueblo alleged to have resulted from the use of a right-of-way upon its lands. Jurisdiction in the District Court was alleged and admitted under 28 U.S.C. § 1362. The Amended Complaint, filed on February 19, 1981, alleged that Mountain Bell or its predecessors lacked a valid right-of-way across Pueblo lands for its transmission lines dating from 1905 to the date of the filing. (Rec., Vol. I, 1.) That Amended Complaint sought an accounting for net rents and profits for the period of unauthorized use, as well as an injunction against further unauthorized use, and additionally sought actual and punitive damages.

Facts Regarding Motion for Partial Summary Judgment on Section 17 Right-of-Way.

Mountain Bell filed a Motion for Partial Summary Judgment seeking a ruling that, from and after February 23, 1928, it had occupied the premises of the Pueblo pursuant to a valid right-of-way, and was, therefore, not a trespasser. Mountain Bell established that on February 23, 1928, the Pueblo's officers executed a right-of-way agreement, granting to Mountain Bell "an easement to construct, maintain and operate a telephone . . . pole line," across the Pueblo's property. (Rec., Vol. I, 26.) That agreement was approved by the Secretary of the Interior on April 13, 1928, expressly acting pursuant to Section 17 of the Act of June 7, 1924, 43 Stat. L. 636. (Rec., Supp. Vol. I, 42-47.) (The Act of June 7, 1924, commonly known as the Pueblo Lands Act, construed by the Opinions below, is found at App. D at 25, Section 17 at 37.)

Following the June 7, 1924 enactment of the Pueblo Lands Act, the Southern Pueblos Agency, Bureau of Indian Affairs ("BIA") approved fifty-nine additional conveyances of rights-of-way and one other form of conveyance pursuant to Section 17, the first being approved in April, 1926 and the last in December, 1959. (Rec., Vol. II, 6.) The Pueblo of Santa Ana granted nine such rights-of-way between April, 1926 and March, 1958. (Rec., Vol. II, 7.) Each instrument was granted by the Pueblo and was approved at the level of Secretary or Assistant Secretary of the Interior (Rec., Vol. II, 7) and not at the local level.

Facts Regarding Motion for Partial Summary Judgment on Res Judicata Issue.

Mountain Bell's Summary Judgment Motion also maintained that the Plaintiff's claims for trespass were barred on *res judicata* grounds by reason of a final judgment entered in a 1927 quiet title suit involving the same parties, the same telephone line and the same claims. In accordance with Section 2 of the Pueblo Lands Act, the United States, on behalf of the Pueblo of Santa Ana, filed *United States of America as Guardian of the Pueblo of Santa Ana in the State of New Mexico, Plaintiff v. Charles F. Brown, et al., Defendants*, Civil Action No. 1814 in Equity (D.N.M. 1927) ("*U.S. v. Brown*"), to quiet title to certain lands of the Pueblo.

Mountain Bell was joined by service of process in that action. The United States asserted that Mountain Bell and others were in trespass and claimed interests in portions of Pueblo lands which constituted a cloud upon the title of the Pueblo. (Rec., Supp. Vol. I, 52.) The complaint requested the Court to quiet title to the property in the Pueblo and to enjoin the alleged trespasses.

During that suit, and in partial performance of an agreement between the Pueblo's attorney, Mr. George A. H. Fraser, and Mountain Bell's attorney, Mr. Milton Smith (Rec., Supp. Vol. I, 1-9), Mountain Bell obtained Secretarial approval of a new right-of-way agreement granted by the Pueblo on February 23, 1928. (Rec., Supp. Vol. I, 42-47.) Following the United States attorney's assurances that he would not proceed further against Mountain Bell if its title would "presently be perfected" (Rec., Supp. Vol. I, 5), Mountain Bell forwarded the executed right-of-way agreement to Washington for Secretarial approval. (Rec., Supp. Vol. I, 6.) The 1928 right-of-way was approved by Mr. John H. Edwards, Assistant Secretary of the Interior "pursuant to § 17 of the Act of June 7, 1924," on April 13, 1928. (Rec., Supp. Vol. I, 42-47.)

On May 23, 1928, Mountain Bell informed Mr. Fraser of the approval, reiterated its understanding that it would now be dismissed from the 1927 quiet title action, and offered to sign a written stipulation if one was desired. (Rec., Supp. Vol. I, 7.) No stipulation was ever presented to Mountain Bell. On May 31, 1928, the United States moved to dismiss Mountain Bell on the grounds:

That subsequent to the institution of this suit said defendant has obtained a deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with Section 17 of the Pueblo Lands Act of June 7, 1924, and that thereby said defendant has obtained, for an adequate consideration, good and sufficient title to the right of way in controversy herein between plaintiff and said defendant.

(Rec., Supp. Vol. I, 57.)

Pursuant to that Motion, the court dismissed Mountain Bell from the 1927 suit by Order dated May 31, 1928, reciting that:

it appears to the court that since the institution of this suit said defendant has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with the provisions of Section 17 of the Pueblo Lands Act of June, 1924

(Rec., Supp. Vol. I, 58). Following the dismissal of Mountain Bell from that prior lawsuit on May 31, 1928, until 1980, neither the Pueblo nor anyone on its behalf notified Mountain Bell of any contention that it did not have the right to maintain the telephone line in question across the Pueblo's land.

Statement of Proceedings

On June 3, 1982, Judge Mechem entered his Memorandum Opinion and Order (App. B at 14) granting partial summary judgment for the Pueblo. The Memorandum Opinion did not discuss any of Mountain Bell's affirmative defenses, but nevertheless ordered that the "Pueblo shall recover damages from April 18, 1928 to the date [Mountain Bell's] telephone and telegraph line was removed." The Pueblo's prayer for punitive damages was expressly denied. (App. B at 22.)

Pursuant to an Order entered on July 14, 1982 (App. B at 23), Mountain Bell applied to the Court of Appeals for Tenth Circuit for an interlocutory appeal on July 23, 1982. Thereafter, in December, 1982, sixteen other law-

suits were filed in the District of New Mexico alleging Section 17 violations. (App. F.) Mountain Bell was named in 5 of these actions. The defendants include individuals, corporate entities, the State of New Mexico and its subdivisions, and the Department of the Interior.

On January 28, 1983, the Circuit Court granted Mountain Bell permission for interlocutory appeal. The Tenth Circuit filed its Memorandum Opinion and Order affirming the decision of the District Court on May 14, 1984 (App. A at 1.) Judgment was entered on the same day. (App. C at 24.) Petitioner here seeks review of that opinion and judgment.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit Opinion, In Voiding Rights-Of-Way Granted By Pueblos And Approved By The Secretary Of The Interior Pursuant To Section 17, Decides An Important Question Of First Impression Concerning A Federal Statute Which Has Not Been, But Should Be, Settled By This Court.

No decision of this Court has construed the force and effect of the Pueblo Lands Act on the Pueblo Indians or those with whom they conduct business. The Tenth Circuit decision in this case invalidates an administrative interpretation of that Act utilized by the BIA in approving at least sixty rights-of-way over a period of thirty years across lands of the Pueblos of New Mexico. The New Mexico Pueblos are a unique form of Indian

tribe under Federal law. This Court has addressed their status and history leading up to the enactment of the Pueblo Lands Act. See *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Sandoval*, 231 U.S. 28 (1913); *United States v. Joseph*, 94 U.S. 614 (1877); see also, *United States v. Pico*, 5 Wall. 536, 540 (1867); *Chouteau v. Molony*, 16 How. 203, 237 (1853). Under Spanish and Mexican law, Pueblo Indians had full title to their lands, but were regarded as under a state of tutelage, and could alienate their lands only under governmental supervision. *United States v. Candelaria*, 271 U.S. at 432. Their rights under Spanish and Mexican law were considered to fall within the general confirmation of the Treaty of Guadalupe-Hidalgo, and no treaty ever was negotiated with any of the Pueblos. F. Cohen, *Handbook of Federal Indian Law*, 387 (1942 ed., Univ. of N.M. Press Reprint).

Following the impressment of United States Territorial status upon New Mexico, it was initially held that, because of their "peaceable, industrious" character, and because they lived in "fixed communities, each having its own municipal or local government," the Pueblo Indians were not within the class of Indians to whom a trust relationship with the United States was extended by the Act of February 27, 1851, 9 Stat. 574. *United States v. Joseph*, 94 U.S. at 616-617. Subsequent actions of the Secretary, and the New Mexico Enabling Act, Act of June 30, 1910, 36 Stat. 557, caused this Court to cast doubt upon that conclusion in *United States v. Sandoval*, 231 U.S. at 48-49.

To resolve uncertainties as to the status of title of many non-Indians to whom interests in Pueblo lands had been conveyed prior to the *Sandoval* decision, the Pueblo

Lands Act was enacted. Section 17 of the Pueblo Lands Act was the only provision of that Act that arguably authorized the prospective conveyance of any interests in its lands by a Pueblo. Because the Opinion below invalidates all rights-of-way granted by the BIA pursuant to that Section, Certiorari should be granted to resolve whether the agency's construction, contemporaneously adopted and consistently applied thereafter, so conflicted with statutory authority as to mandate voiding all rights of grantees obtained and maintained in reliance upon that Act.

A. The Tenth Circuit Opinion Conflicts With The Language Of Section 17 And The Purpose Of The Pueblo Lands Act.

Because the Tenth Circuit Opinion failed to give meaning to each provision of Section 17 in light of its language and purpose, that Opinion prescribes a construction of Section 17 wholly at odds with that undisputedly placed upon it by those contemporaneously applying it. The Court's failure carefully to parse the statutory provisions prevented it from discerning why the Pueblos, the Interior Department, and non-Indians dealing with the Pueblos all understood Section 17 to authorize the granting of rights-of-way by Pueblos if approved by the Secretary. Section 17 should reasonably be construed to support that contemporaneous construction. Section 17 states:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by

Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, *shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.*

(App. D at 37; Emphasis added.) The Tenth Circuit invalidates the contemporaneous construction of the Section based primarily on the conclusion that since the two major clauses of Section 17 were joined by the word “and”, the conditions contained in both clauses had to be satisfied. The Court below held, therefore, that since “Congress had provided no method” for conveyances, “the approval of the Secretary [was] meaningless.” (App. A at 9.)

The Tenth Circuit’s grammatical observation that “and” is a conjunctive cannot support its construction of Section 17.¹ While it is obvious that Section 17 is comprised of two main clauses, those clauses are not dependent and do not create compound conditions, both of which must be satisfied. Rather, the language and focus of each independent clause contrast sharply, and each clause has a different purpose. The second clause expressly concerns the voluntary “sale, grant, lease . . . or . . . conveyance” by a Pueblo, and prescribes that no such conveyance shall be valid unless approved by the Secretary. By con-

1. The punctuation employed, in fact, supports the position that the clauses are *independent*. In joining two dependent clauses, a comma prior to the conjunctive word is *not* used. When two independent clauses are joined by a “and” the “and” acts as a mark of punctuation like a period or a semicolon, coordinating the two *independent clauses*. See Kierzek and Gibson, *McMillan Handbook of English*, Rule 13, p. 282 (McMillan Co., 1960); Milward, *Handbook for Writers*, Rule 27.A, p. 104 (Holt, Rinehart and Winston, undated).

trast, the first clause does not refer to instruments voluntarily granted by a Pueblo. Rather, that clause in referring to titles “*acquired or initiated* by virtue of the laws of the State of New Mexico, or in any other manner,” refers to titles or interests obtained in some manner other than by voluntary conveyance, such as by adverse possession or condemnation. These titles, it states, may not be acquired or initiated “except as may hereafter be provided by Congress.” The Tenth Circuit erred in engrafting the conditions of the first clause upon the voluntary conveyances that are the subject of the second clause.

The failure of the Court below to understand the purpose of the second clause of Section 17 in the statutory scheme is demonstrated by the fact that its holding invalidates the *only* method by which Pueblos were then understood to be empowered to convey. At the time of its passage, no one doubted the ability of the Pueblo to grant interests in property, provided the Pueblo had Secretarial approval. (See text at p. 16, n.6, *infra*.) The *second* clause of Section 17 is the only provision of the Pueblo Lands Act which arguably authorizes approved Pueblo grants of rights-of-way, and it was so understood at the time. The Tenth Circuit Opinion results in the illogical conclusion that, at the time of its passage, the second clause of Section 17 was meaningless and would have no object unless and until Congress “hereafter provided,” under the first clause, for approved Pueblo conveyances. This construction is in conflict with the well-recognized rule that, in construing legislation, an attempt should be made to give effect to all of its provisions. *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255, 261 (1975).

The Pueblo Lands Act uniformly has been construed consistent with the administrative interpretation, in the

manner invalidated by the Opinion below: under Section 17, "the tribal council has a right to make leases and permits on its own initiative subject to the approval of the Department." F. Cohen, *Handbook of Federal Indian Law*, *supra*, at 104;² see also, *The Legal Status of the Indian Pueblos of New Mexico and Arizona*, 57 I.D. 36, 49 (1939); *Alonzo v. United States*, 249 F.2d 189, 195 (10th Cir. 1957), *cert. denied* 355 U.S. 940 (1958); *Pueblo de San Juan v. United States*, 47 F.2d 446, 447 (10th Cir.), *cert. denied*, 248 U.S. 626 (1931). This Court should issue its Writ of Certiorari to decide whether that interpretation should be restored.

B. The Opinion Below Conflicts With Decisions Of This Court In Concluding That The Non-Intercourse Act of 1834 Supports Invalidation Of Section 17 Rights-Of-Way.

The Opinion below failed to consider this Court's recognition of a tribe's power to convey subject to the approval of the United States. The Court of Appeals' conclusion that the Non-Intercourse Act requires compliance with both clauses of Section 17 (App. A at 7-8), is refuted initially by a comparison of 25 U.S.C. § 177 and Section 17. That comparison mandates the conclusion that, in drafting Section 17, Congress employed a statutory model with which it was quite familiar and that figured prominently in the Pueblo Lands Act hearings: the Non-Intercourse Act. The current iteration of that Act provides:

[N]o purchase, grant, lease or other conveyance of lands, or of any title or claim thereto, from any In-

2. Dr. Cohen also refers to Section 17 as one of "various other special acts [that] have provided for leases of tribal land". *Id.* at 327 (footnotes omitted).

dian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution

Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177 (App. E.)

By substituting from Section 17 the word "sale" for "purchase" in the 1834 Act quoted above; by substituting from Section 17 "made by any pueblo as a community, or any pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico . . ." for the phrase quoted above "from any Indian nation or tribe of Indians . . ."; and by substituting from Section 17 "first approved by the Secretary of Interior . . ." for the Non-Intercourse Act language "made by treaty or convention entered into pursuant to the Constitution . . .",³ the Non-Intercourse Act becomes identical to the second provision of Section 17. This textual incorporation of the Indian Non-Intercourse Act in the second provision of Section 17 strongly supports the position that Congress intended that compliance with that clause would satisfy Non-Intercourse Act requirements. Accordingly, the Non-Intercourse Act cannot justify the Tenth Circuit Court's engrafting additional requirements from the first provision of Section 17, *i.e.*, future legislation, onto the sole requirement of the second provision, Secretarial approval.

3. By virtue of the Act of March 3, 1871, c.120, § 1, 16 Stat. 566, 25 U.S.C. § 71, the requirement of the Non-Intercourse Act that alienation be made by "treaty or convention entered into pursuant to the Constitution" was supplanted by the power of Congress to legislate unilaterally. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305 (1902) (the act of March 3, 1871 made "the Indian tribes amenable directly to the power and authority of the laws of the United States by the immediate exercise of its legislative power over them")

The Indian Non-Intercourse Act of 1834, and its predecessor enactments contemplate, rather than condemn, conveyances by tribes with approval of the United States.⁴ The notion embodied in the 1834 Non-Intercourse Act of tribal power to convey subject to approval by the United States is reflected in the contemporaneous Supreme Court decision in *Mitchel v. United States*, 9 Pet. 711, 758-759 (1835): "The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected, and guarantied (sic) by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the king." As stated by Cohen, "[w]hat had been conceded, by way of *dictum*, in *Johnson v. M'Intosh*, namely that Indian title included power to transfer as well as to occupy, is the core of the decision in the *Mitchel* case." Cohen, *Original Indian Title*, 32 Minn. L. Rev. 28, 50 (1947).

United States v. Candelaria further supports this historical understanding of Pueblo power that was embraced in the 1834 Act and, by extension, in Section 17 of the Pueblo Lands Act. In *Candelaria*, Justice Van Devanter

4. Those Acts were:

not intended to prevent the alienation of Indian lands and in fact many Indian treaties . . . provided for the alienation of Indian lands to parties other than the United States, notably religious bodies, railroads, or other Indian tribes. . . . And in a few cases, the tribe itself is given authority to sell land to a named grantee or to any purchaser. F. Cohen, *Handbook of Federal Indian Law*, *supra* at 323 (footnotes omitted).

stated that the application of the 1834 Act to the Pueblos of New Mexico had the effect of "continuing a policy which prior governments had deemed essential to the protection" of the Pueblo Indians. 271 U.S. at 442. The policy to be carried forward, which had been established by the Spanish and Mexican governments, provided that conveyances of Pueblo lands were to "be made 'under the supervision and the approval' of designated authorities." *Id.*, quoting *United States v. Pico*, 5 Wall. 536, 540 (1867). Clearly, the "designated authority" to approve Pueblo conveyances under Section 17 of the Pueblo Lands Act was the Secretary of the Interior.

Therefore, the Opinion below, in invalidating Section 17 rights-of-way across Pueblo lands conflicts with this Court's decisions construing the legislative intent of the Non-Intercourse Acts. Certiorari should be granted to correct this significant misapprehension of federal law.

C. The Opinion Below Neglects To Consider That The Language Of Section 17 Is Consistent With The Congressional Intent To Allow Pueblo Conveyances With Secretarial Approval.

Mountain Bell found no legislative history specifically pertaining to Section 17 as enacted. The purpose and intent of that Section, however, may be gleaned from the general legislative history of the Pueblo Lands Act,⁵ and

5. In the First Session of the 67th Congress, Senator Bursum of New Mexico introduced two bills pertaining to Pueblo Indian lands. On May 31, 1921, he introduced S.1938 (61 Cong. Rec. S1939, daily ed. May 31, 1921) and on July 19, 1921,

(Continued on next page)

from Congress' understanding of the nature of federal responsibilities to Indian Pueblos. A reading of that history makes clear that 10 years after the *United States v. Sandoval* decision, the sovereign ability of the Pueblos to alienate property with the consent of the United States was not doubted.⁶ In the Congressional hearings, concern was expressed, however, as to whether governmental consent was required as a control on alienation—an act of guardianship seemingly required by the *Sandoval* decision. Congress was informed that, since *Sandoval*, the Pueblos were required to submit for Secretarial approval all leases and conveyances.⁷ Further, the remarks of Mr. Francis C. Wilson, principle representative for the Pueblos in the Lands Act hearings, indicate that a provision authorizing conveyances by the Pueblos conditioned upon Secretarial approval was desirable.⁸

(Continued from previous page)

he introduced S.2274 (Cong. Rec. S4031, daily ed. July 1, 1921). At the request of then Secretary of the Interior Albert Fall, these bills were not acted upon (Hearings on S.3865 and S.4223 Before a Subcommittee of the Committee on Public Lands and Surveys, United States Senate, 67 Cong., 4th Sess., 282, pp. 7, 31-82, 254 (1923) ("1923 Senate Hearings"). In the Second Session of the 67th Congress, four Pueblo land acts were introduced: two in the House and two in the Senate. In the Senate, Senator Bursum introduced S.3885, and Senator Jones of New Mexico introduced S.4223. In the House, Rep. Snyder introduced H.R. 13452 and Rep. Leatherwood introduced H.R. 13674. Extensive hearings were held on these four bills in both the Senate and the House. (Hearings on H.R. 13452 and H.R. 13674 Before the Committee on Indian Affairs, House of Representatives, 67th Cong., 4th Sess., 413 pp. (1923) ("1923 House Hearings").

6. 1923 Senate Hearings, 72-73, 154-155, 229; 1923 House Hearings, 40-41.

7. 1923 Senate Hearings, 72-73, 154-155.

8. 1923 Senate Hearings, 154-155.

The legislative history contains no indication that a voluntary conveyance by a Pueblo *approved by the Secretary* would be void.

The Tenth Circuit's citation of one House Report, H. R. Rep. No. 787, 68th Cong. 1st Sess. 2 (1924) (App. A at 8), does not support such conclusion. That quotation, which concerned *unauthorized* conveyances of Pueblo lands without any consent or involvement of the United States, does not involve any issue material to the validity of Mountain Bell's right-of-way, which was concededly approved by the Secretary. The Acts' legislative history does not support overturning the administrative construction.

D. The Opinion Below Conflicts With The Reasonable Construction Given The Statute By The Administrative Agency Charged With Its Enforcement For Over Thirty Years And Disregards Reliance By Grantees On That Construction.

Certiorari should be granted to correct the Tenth Circuit's invalidation of an established construction given the statute by the administrative agency charged with its enforcement for over thirty years. *Morton v. Ruiz*, 415 U.S. 199, 201-202 (1974) (decision below asserted to be "inconsistent with the long-established policy of the Secretary [of the Interior] and the Bureau [of Indian Affairs]"); and *Patterson v. Lamb*, 329 U.S. 539, 541 (1947) (decision below upset 25 years of War Department rulings and practices).

The Tenth Circuit did not dispute that the evidence before it established a contemporaneous construction of Section 17. (App. A at 10.) The administrative practice, joined in by the Pueblos, resulted in grants of at least sixty rights-of-way by the Southern Pueblos between April 28, 1926, and December, 1959. Nine of the rights-of-way were granted by the Pueblo of Santa Ana. (Rec., Vol. II, 6.)

Most rights-of-way granted by the Pueblo were granted between 1926 and 1928. However, two rights-of-way were granted to the Bureau of Reclamation, Department of the Interior by the Pueblo in the 1950s. The June 15, 1956 grant (Rec., Vol. II, Ex. 9), was authorized by a Pueblo Resolution, dated December 13, 1955, stating that:

In view of the fact that regulations of the Department of the Interior governing rights of way (25 C.F.R. 256.19) provide that the Superintendent may approve a right of way for this purpose not to exceed fifty years, it is desired by the Pueblo of Santa Ana that the hereinabove mentioned right of way be approved, in perpetuity, by the Secretary of the Interior under provisions of the Pueblo Lands Act, approved June 7, 1924, 43 Stat. 636.

The Pueblo's June 15, 1956 grant of right-of-way also referred to the June 7, 1924 Act, and another Resolution was passed on August 27, 1957 containing language almost identical to that quoted above. Pursuant to that Resolution, an Agreement dated November 4, 1957, stated that it shall not be "effective until approved by the Secretary of the Interior, pursuant to Sec. 17 of the Act of June 7, 1924, 43 Stat. 636". (Rec., Vol. II, Ex. 8.)

Further record evidence of the contemporaneous construction of Section 17 is contained in correspondence of

the Interior Department. In July, 1924, the Secretary of the Interior had attempted to grant a right-of-way to a railroad across Pueblo lands under the general right-of-way statutes then in effect.⁹ In 1925, the Pueblo Lands Board informed the Secretary that, in its opinion, those right-of-way statutes had no application to the Pueblos.¹⁰ The position of the Interior Department concerning that 1925 controversy, related to Congress by the Commissioner of Indian Affairs during 1975 hearings on subsequent legislation, further reflects the then-existing administrative interpretation of Section 17: since the Secretary had no authority to grant rights-of-way across Pueblo Lands at that time, the Department determined that the only way the railroad could obtain the right-of-way was "if the Pueblos would execute a deed for the easement for right-of-way purposes and the transaction was approved by the Secretary of the Interior under the provisions of Section 17 of the Pueblo Lands Act"¹¹ Finally, when one Pueblo refused to grant a right-of-way, Congress was implored to intervene, and did so by passing legislation in 1926 that provided for condemnation of Pueblo lands.¹²

9. Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312-318.

10. Hearings on S.217 Before the Subcommittee on Indian Affairs of the Committee of Indian and Insular Affairs, House of Representatives, 94th Cong., 4th Sess., Ser. No. 94-30, p. 2 (1975) ("1975 Hearings"); and see H. Rep. 94-800, 94th Cong., 2d Sess. (1976), S. Rep. 91-148, 94th Cong., 1st Sess. (1975). Mr. Fraser, the attorney who presented the Pueblo in *United States v. Brown*, shared this opinion based on the first clause of Section 17. (Rec., Supp. Vol. I, 14-20.)

11. 1975 Hearings, p. 2. Again Mr. Fraser understood this, since he informed the Attorney General in a letter that certain Pueblos would not agree to such a conveyance. (Rec., Supp. Vol. I, 14-20.)

12. Act of May 10, 1926, 44 Stat. 498; 1975 Hearings, p. 2.

The Tenth Circuit's refusal to consider this administrative practice under Section 17 rested on a false premise that this Court should now correct. The Court stated:

the courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate or frustrates congressional policy. . . . In our opinion, the administrative actions on which Mountain Bell relies violate the plain congressional intent of § 17 of the Pueblo Lands Act.

(App. A at 10.)

Section 17's two clauses each expressly refer to different means of acquiring interests in property. (See text at pp. 9-12, *supra*.) It was erroneous as a matter of law to conclude that two clauses expressly referring to different types of alienation both unambiguously refer to a subject expressly referred to in only one of them, *i.e.*, the validity of a "sale, grant, lease . . . or other conveyance." The conclusion is further suspect because the first clause of Section 17, relied upon by the Tenth Circuit, also refers to matters extraneous to the administrative practice, such as the acquisition or initiation of property rights under state law. Although it may fairly be said that Section 17's two clauses unambiguously speak to two subjects, the Section bristles with ambiguity if all its terms are asserted to have a unitary application. The cases of this Court preclude the invalidation of all rights granted pursuant to such a statute without a full consideration of the administrative record and its entitlement to deference.

The undisputed evidence of long-standing and apparently unwaivering adherence by the Interior Department, the agency charged with application of the Act, was "entitled to great deference, particularly when that interpretation ha[d] been followed consistently over a long period of time." *United States v. Clark*, 454 U.S. 555, 102 S.Ct. 805, 811 (1982); see also *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 42, n. 27 (1977). This principle should be entitled to even more respect because "the administrative practice at stake [here] 'involve[d] a contemporaneous construction of a statute by the men charged with responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they [were] yet untried and new'." *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933). Because the administrative interpretation was a reasonable one, the Tenth Circuit erred by substituting its views for those of the agency. *Udall v. Tallman*, 380 U.S. 1, 4 (1965); see also *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

The Tenth Circuit Opinion is not only irreconcilably inconsistent with these principles, but also is condemned for its failure to consider the long-standing and undisputed reliance on the unwaivering agency practice by Mountain Bell and at least fifty-nine other grantees of rights-of-way in affirming the District Court's grant of summary judgment. *Minnesota Co. v. National Co.*, 3 Wall. 332 (1865); and *United States v. Title Insurance &*

Trust Co., 265 U.S. 472, 486-487 (1924); see also *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-458 (1978); *McLaren v. Fleischer*, 256 U.S. 477, 481 (1921). Certiorari should be granted to restore those grantees to the rights they were intended to obtain under the Act.

II. The Opinion Below, In Holding That A Consent Decree Entered In A Pueblo Lands Act Quiet Title Suit Is Not A Final Judgment For Purposes Of Res Judicata Decides An Important Question Of Federal Law In A Manner Which Conflicts With Decisions Of This Court And Of Other Circuits.

This Court's decision in *Nevada v. United States*, — U.S. —, 103 S.Ct. 2906 (1983), ("*Nevada*") confirms that a consent decree based upon an agreement of the parties to the controversy should be given *res judicata* effect, particularly where that prior decree entered decades ago resolves property rights. 103 S.Ct. at 2918, n. 10. See also, *Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382, 1392 (1983); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486-487 (1924). Principles underlying quiet title decrees, this Court concluded, become "rules of property" and are "distinctly equipped to serve [the policies of *res judicata*]" 103 S.Ct. at 2918, n. 10.

The record in this case establishes that the Order in *United States v. Brown*, No. 1814 in Equity (D.N.M. May 31, 1928), dismissing Mountain Bell as a party, was the result of an express agreement between the attorney representing the Pueblo and Mountain Bell counsel. (Rec., Supp. Vol. I, 1-9.) In partial compliance with that agreement, and as a condition of dismissal, Mountain Bell obtained Secretarial approval in accordance with Section 17 for the conveyance which it had obtained from the Pu-

eblo. (Rec., Supp. Vol. I, 5.) In consideration of that compliance, the United States dismissed the quiet title suit as against Mountain Bell.

The Tenth Circuit Opinion does not refute that the 1928 action concerned the same property, the same claims, and the same parties as does the Pueblo's present action. Nor does that Court dispute that the 1928 Order of Dismissal embodies the parties' contractual agreement that when Mountain Bell satisfied conditions imposed by the United States, claims by the United States on behalf of the Pueblo would be dismissed, and Mountain Bell's rights would be secured. Instead, contrary to the principles established in *Nevada*, the Court below rested its holding on its observation that the consent decree did not state that the agreed to dismissal was "with prejudice" (App. A at 11-12), and did not constitute a final judgment. (App. A at 11.)

Just as in the quiet title suit adjudicating water rights in *Nevada*, the dispute resolution policies underlying the Pueblo Lands Act require that the 1928 Order of Dismissal be accorded *res judicata* effect. Suits brought under that Act were to be all-encompassing, initiated by a "bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians" (App. D at 25.) The consensual dismissal of Mountain Bell is reinforced by the Congressional intent that all Pueblo land claims be finally resolved within the procedures prescribed by that Act. Like the action in *Nevada*, the quiet title actions authorized under the Pueblo Lands

Act were "‘no garden variety quiet title action[s].’" 103 S.Ct. at 2925. They were "‘intended by all concerned, lawyers, litigants and judges, as . . . general all inclusive . . . adjudication suit[s] which sought to adjudicate all rights and claims . . . and required all parties to fully set up their respective . . . claims.’" *Id.* at 2913. Therefore, the Opinion below, in neglecting to consider the policies of finality embodied in the Pueblo Lands Act quiet title suits, irreconcilably conflicts with this Court's opinion in *Nevada*.¹³

The Tenth Circuit Opinion also is in error in suggesting that since the 1927 lawsuit was not dismissed "with prejudice," it was not entitled to *res judicata* effect (App. A at 12), despite the clear intentions of the parties that the dismissal resolve the underlying dispute. That conclusion conflicts with the Seventh Circuit decision in *Brunswick Corp. v. Chrysler Corp.*, 408 F.2d 335, 337 (7th Cir. 1979). Unlike the instant case, where no reference at all was made to "prejudice," in *Brunswick* the court specifically granted the dismissal "without prejudice." The Seventh Circuit refused to hold that such language precluded *res judicata* effect because to do so would "nullif[y] the clear meaning" of the parties' agreement to settle claims concerning the validity and infringement of a patent embodied in the consensual dismissal. *Id.* at 338. Other Seventh Circuit cases demonstrate a similar commitment to effectuating parties' agreements by giving *res judicata* effect to consent decrees. See *American Equip-*

13. Even the Pueblos' representative at the Pueblo Lands Act hearings was aware that a decree in one of these actions would have a *res judicata* effect. 1923 Senate Hearings, 242.

ment Corp. v. Wikomi Manufacturing Co., 630 F.2d 544 (7th Cir. 1980); *Martino v. McDonald's System, Inc.*, 598 F.2d 1079 (7th Cir.), *cert. denied*, 455 U.S. 966 (1979).

The Tenth Circuit Opinion further holds that because the court never ruled on the validity of Mountain Bell's right-of-way, that the Order of Dismissal has no *res judicata* effect. This is contrary to Second Circuit holdings, which are squarely based on decisions of this Court. *Stuyvesant Insurance Co. v. Dean Construction Co.*, 254 F. Supp. 102, 111 (S.D.N.Y. 1966), *aff'd. sub nom, Stuyvesant Co. v. Kelly*, 382 F.2d 991 (2d Cir. 1967), holds that *res judicata* operates, assuming a final judgment, "regardless of whether all grounds for recovery or defenses were judicially determined," and whether or not the parties' assessment of their legal positions was accurate.

The Tenth Circuit opinion also is falsely premised on its contention that the decree had no binding effect if the earlier judgment was based on an erroneous application of law or if the right sought to be enforced would have been void, citing only *National Life & Accident Ins. Co. v. Parkinson*, 136 F.2d 506 (10th Cir. 1943) (App. at 12). That case plainly rested on the ground that the statute vesting jurisdiction in the court in which the consent decree was entered was void, not on the invalidity of any right asserted in the underlying action. There is, of course, no contention that the Pueblo Lands Act was void to the extent it vested Federal equity courts with jurisdiction over suits under the Act. The *National Life* case is further inapplicable because a consent decree binds the parties even if the legal principles on which one of the parties relied was never actually passed upon or was later determined

to be erroneous. *Angel v. Bullington*, 330 U.S. 183, 190 (1947); *Stuyvesant Insurance Co. v. Dean Construction Co.*, *supra*, 254 F.Supp. at 111.

The consent decree binds the Pueblo without regard to the validity of the right-of-way. See *Heckman v. United States*, 224 U.S. 413, 434-435 (1912). Certiorari should be granted to correct this unwarranted divergence from the principle of finality of judgments.

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CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a Writ of Certiorari be issued to review the Judgment and the Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 13th day of August, 1984.

GILBERT M. WESTA
KATHRYN MARIE KRAUSE
931 - 14th Street, Suite 1300
Denver, Colorado 80202
Telephone: (303) 624-2200

Counsel For Petitioner

5-14-83

83-1220

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

No. 83-1220

PUEBLO OF SANTA ANA,

Plaintiff-Appellee,

vs.

THE MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY

Defendent-Appellant.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,

Amicus Curiae

PUEBLO DE ACOMA,

Amicus Curiae

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Amicus Curiae

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 80-841-M Civ.)
(Filed May 14, 1984)

Scott E. Borg of Luebben & Hughes, Albuquerque, New Mexico, for Plaintiff-Appellee.

Kathryn Marie Krause, Denver, Colorado (Stuart S. Gunckel, Denver, Colorado, with her on the brief) for Defendant-Appellant.

Gary Crosby, Santa Fe Industries, Inc., Chicago, Illinois and John R. Cooney, Lynn H. Slade, John S. Thal and Walter E. Stern, III of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, filed briefs on behalf of Amicus Curiae The Atchison, Topeka & Santa Fe Railway Company. Public Service Company of New Mexico joined in the Amicus Briefs of The Atchison, Topeka & Santa Fe Railway Company.

Arturo G. Ortega of Ortega & Snead, P.A., Albuquerque, New Mexico and Peter C. Chestnut of Albuquerque, New Mexico, filed a brief on behalf of Amicus Curiae of Pueblo de Acoma.

Before McWILLIAMS BREITENSTEIN and LOGAN,
Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is an interlocutory appeal from the United States District Court for the District of New Mexico which we permitted to be filed. The court granted partial sum-

mary judgment to the plaintiff-appellee, Pueblo of Santa Ana, and against the defendant-appellant, Mountain States Telephone and Telegraph Company, Mountain Bell. The dispute involves a right of way for a telephone and telegraph line across Pueblo lands. The trial court held in favor of the Pueblo and Mountain Bell appeals. We affirm.

The Pueblo was the owner of a tract of land situated in New Mexico which was a part of the El Ranchito Grant. In November, 1927, the United States pursuant to the Pueblo Lands Act, 43 Stat. 636, filed an action in the federal district court for the district of New Mexico entitled United States as Guardian of the Pueblo of Santa Ana v. Brown, No. 1814 Equity (D.N.M. 1928), seeking to quiet title to this tract in the Pueblo. Mountain Bell was party to that suit. During the course of that litigation, the Pueblo entered into a right-of-way agreement with Mountain Bell, dated February 23, 1928, granting an easement to construct, maintain, and operate a telephone and telegraph line, the same line that is in controversy here. Acting pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, 641-642, the Secretary of the Interior approved the agreement. The United States then moved to have Mountain Bell dismissed from the action on the ground that it had obtained title to the right of way through the easement agreement. In granting this motion, the court noted that it appeared "that since the institution of this suit said defendant has secured good and sufficient title to the right of way and premises in controversy. . . ."

In the present action Mountain Bell argues that it obtained a valid right of way across the Pueblo's land in 1928 and under § 17 of the Pueblo Lands Act of June 7,

1924, 43 Stat. 636. It argues further that the Pueblo's claims are barred by the 1928 dismissal of the case involving the same parties and issues. On these grounds, Mountain Bell moved for summary judgment that no trespass existed from 1928 to the present. The district court held, however, that § 17 did not authorize conveyance of lands by the Pueblo with the approval of the Secretary. The district court accepted the Pueblo's argument that § 17 was intended as a prohibition against the alienation of Pueblo lands except as Congress may provide in the future. Its requirements of Congressional authorization and Secretarial approval paralleled and were intended to extend to the Pueblo the Nonintercourse Act's requirement of a treaty or convention entered into pursuant to the Constitution. See Acts of June 30, 1834, 4 Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177), and February 27, 1851, 9 Stat. 574, 587 § 7. The court further held that the Pueblo's claims were not barred by the 1928 dismissal order because that order did not constitute a final judgment.

Section 17 of the Pueblo Lands Act provides:

"No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." [Emphasis supplied.]

Mountain Bell challenges the argument of the Pueblo, upheld by the trial court, that § 17 was intended as an extension to the Pueblos of the Nonintercourse Act, in prohibiting alienation of Pueblo lands except as Congress may provide in the future and as approved by the Secretary. Mountain Bell argues that the first clause of § 17 requires Congressional approval for condemnations and other similar takings of Pueblo lands and that the second clause authorizes a pueblo to alienate its lands if it obtains Secretarial approval. Analysis of these arguments requires an examination of the language, the historical background, the legislative history, and the administrative history of the Act.

The Nonintercourse Act required a treaty or convention to alienate Indian lands, Act of June 30, 1834, 4 Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177). The Act of February 27, 1851, 9 Stat. 574, 587 § 7, extended all laws then in force regulating trade and intercourse with the Indian tribes to include Indian tribes in the Territory of New Mexico.

In *State of New Mexico v. Aamodt*, 10 Cir., 537 F.2d 1102, cert. denied 429 U.S. 1121, a water rights case, we reviewed the historical background of the controversy, pp. 1105 and 1109, and pointed out, p. 1105, that the efforts of federal officials to protect the Pueblos' property were frustrated by the New Mexico territorial courts which held that the Pueblos were outside the protection of federal laws. This rationale was upheld by the Supreme Court in *United States v. Joseph*, 94 U.S. 614.

We noted, at p. 1105, that the 1910 New Mexico Enabling Act, 36 Stat. 557, 558-559, defined "Indian country"

to include "all lands now owned or occupied by the Pueblo Indians" and stated that such lands are "under the absolute jurisdiction and control of the Congress of the United States." The constitutionality of this provision was upheld in *United States v. Sandoval*, 231 U.S. 28, which specifically overruled *United States v. Joseph*. The Court said, *Id.* at 39, that,

"The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government."

The Court noted that the United States has treated the pueblos "as requiring special consideration and protection, like other Indian communities." *Id.*

Because in the *Joseph* decision the Supreme Court decided that the Pueblo lands were not subject to the protective laws earlier passed by Congress, non-Indians were free to acquire Pueblo lands. The validity of titles so acquired became questionable when in *Sandoval* the Court held that the protective federal statutes did apply and presumably always had applied. Congress responded with the passage in 1924 of the Pueblo Lands Act, 43 Stat. 636. The Act established a "Pueblo Lands Board" to investigate the Pueblo lands and determine those cases in which the Indian title should be extinguished. The United States as guardian of the Pueblos was required to institute quiet title actions to settle adverse claims to Pueblo lands. Non-Indians claiming title could plead adverse possession and the statute of limitations, defenses not ordinarily available against the United States.

In 1926, the Court in *United States v. Candelaria*, 271 U.S. 432, reaffirmed *Sandoval*. In so doing, it said after referring to the 1834 and 1851 acts, p. 441:

"While there is no express reference in the provision to the Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians.'"

We echoed this language, noting the application of the Nonintercourse Act to the Pueblo Indians in *Aamodt*, *supra*. In *Plains Elec. Gen. & Tr. Co-op v. Pueblo of Laguna*, 10 Cir., 542 F.2d 1375, 1376, we cited *Candelaria* as authority for the statement that "Lands of the Pueblos cannot be alienated without the consent of the United States." In *United States v. University of New Mexico*, No. 83-1238, 10 Cir. opinion filed April 9, 1984, we noted that Congress extended the Nonintercourse Act to the Pueblos in 1851 and said that § 17 of the Pueblo Lands Act of 1924 "reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act." Slip Op. at 7. In so doing we noted the following statement in *United States v. Chavez*, 290 U.S. 357, 362:

"[T]he status of the Indians of the several Pueblos in New Mexico is that of dependent Indian tribes under the guardianship of the United States and that by reason of this status they and their lands are subject to the legislation of Congress enacted for the protection of tribal Indians and their property."

Thus we have three times held that the Pueblo's lands were under the protection of the Nonintercourse Act.

Mountain Bell argues that § 17 was not a grant of power to the Pueblos to convey their lands, but instead re-

affirmed the power of alienation which already existed in the Pueblos, and implemented the government's guardianship role by restricting that power. This view is insupportable. The House Report on the Pueblo Lands Act, reprinting the language of the Senate Report, states:

"It was only by the decision of the case of the *United States v. Sandoval* (213 U.S. 28) that the Supreme Court of the United States definitely established the principle that these Indians were wards of the Government. . . .

Up to the time of the decision of the *Sandoval* case in 1913, it had been assumed by both the Territorial and State courts of New Mexico, that the Pueblos has [sic] the right to alienate their property. From earliest times also the Pueblos had invited Spaniards and other non-Indians to dwell with them, and in many cases Pueblos and individual Indians attempted to convey lands to non-Indians which under the decision of the *Sandoval* case they were not competent to do." H.R. Rep. No. 787, 68th Cong. 1st Sess. 2 (1924).

It seems clear, then, that if § 17 is not a delegation of power, the 1928 agreement is void.

The terms of § 17 do not provide such authorization to the pueblos to grant their lands. The two clauses of § 17 of the Pueblo Lands Act are joined by the conjunctive "and." To us that means exactly what it says. No alienation of the Pueblo lands shall be made "except as may hereafter be provided by Congress" and no such conveyance "shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." Two things are required. First, the lands must be conveyed in a manner provided by Congress. Second, the Secretary of the Interior must approve. As to the first,

at the time of the agreement between the Pueblo and Mountain Bell, Congress had provided nothing. Hence, the first condition was not met. The fact that Congress had provided no method makes the approval of the Secretary meaningless. The operation of the second clause depends on compliance with the first clause.

Mountain Bell argues that to give the first clause the meaning which we have approved runs contrary to 25 U.S.C. §§ 311-322 providing among other things for rights of way for telephone and telegraph lines. The answer is that Congress did not extend the application of these statutes to the Pueblo Indians of New Mexico until the Act of April 21, 1928, see 25 U.S.C. § 322, which was after the Secretary had given his approval to the agreement, with Mountain Bell. The Secretary's approval, given on April 13, 1928 says that it was done pursuant to the provisions of § 17 of the Act of June 7, 1924.

Mountain Bell makes much of the legislative history of the Pueblo Lands Act. We have examined the Senate and House reports of the hearings. Hearings before a subcommittee of the Committee on Public Lands and Surveys, on S. 3865 and 4223, 67th Cong. 4th Session; Hearings before the Committee on Indian Affairs on H.R. 13452 and H.R. 13674, 67th Cong. 4th Session. We find that the most that can be said about them is that they are ambiguous and add nothing to the express language of the statute. If it be conceded that the statute is ambiguous, and we do not feel that it is, then as said in *Bryan v. Itasca County*, 426 U.S. 373, 392:

"... we must be guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe v. Hollowbreast* 425 U.S. 649, 655 n. 7 (1976), that 'statutes passed for the benefit of dependent Indian tribes ...

are to be liberally construed, doubtful expressions being resolved in favor of the Indians.’”

See also *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354.

Mountain Bell says that the administrative construction of the statute supports its contentions. Although the construction put on a statute by the agency charged with administering it is entitled to deference, the courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate or frustrates congressional policy. *SEC v. Sloan*, 436 U.S. 103, 117-118; and *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746. See also *Plateau, Inc. v. Dept. of Interior*, 10 Cir., 603 F.2d 161, 164. In our opinion, the administrative actions on which Mountain Bell relies violate the plain congressional intent of § 17 of the Pueblo Lands Act.

Mountain Bell argues that the Pueblo's claim is barred by the doctrines of *res judicata* and collateral estoppel because of the dismissal of Mountain Bell as a defendant in *United States v. Brown*, supra, No. 1814 Equity (D.N.M. 1928). The *Brown* suit was filed in November of 1927, under the Pueblo Lands Act of June 7, 1924. Mountain Bell neither entered an appearance in the case nor filed an answer. On April 13, 1928, the Assistant Secretary of the Interior approved an agreement between the Pueblo and Mountain Bell for a telephone lines easement across the Pueblo lands. The approval reads “APPROVED, pursuant to the provisions of Section 17 of the Act of June 7, 1924 (43 Stat. L. 636).”

The United States then filed a motion in the *Brown* case asking the dismissal of Mountain Bell and, as ground for the motion it alleged that,

“subsequent to the institution of this suit said defendant has obtained a deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with Section 17 of the Pueblo Lands Act of June 7, 1924, and that thereby said defendant has obtained, for an adequate consideration, good and sufficient title to the right of way in controversy herein between plaintiff and said defendant.”

In its order granting the motion the trial court echoed the language of the motion. It failed to state whether it was with or without prejudice and it was, therefore without prejudice. See *Ex Parte Skinner and Eddy Corp.*, 265 U.S. 86. *Home Owners' Loan Corp. v. Huffman*, 8 Cir., 134 F.2d 314, 317, says that Rule 41 Fed.R.Civ.P., which adopted this standard, followed long established practice in federal courts and is intended to clarify and make definite that practice.

Mountain Bell argues that the three requirements for application of *res judicata* or collateral estoppel are (1) identity of causes of action, (2) identity of the parties or privity, and (3) a final judgment in the first suit. Only the third need be considered. Mountain Bell says that a voluntary dismissal may be a final judgment for *res judicata* purposes if it addresses and resolves the issue originally in dispute. In making this argument, Mountain Bell relies largely on cases wherein a consent decree was issued. A consent judgment may assume any of several forms. When entered as a decree of dismissal with prejudice, the judgment is generally preclusive. See *Bradford v. Bonner*, 5 Cir., 665 F.2d 680, 682 and *Bloomer*

Shippers Ass'n v. Illinois Central Gulf Railroad Co., 7 Cir., 655 F.2d 772, 777.

The dismissal order in Brown indicates neither the court's consideration nor approval of the agreement. The court said only that it appeared to the court that the defendant had secured good and sufficient title by a deed from the Pueblo approved by the Secretary of the Interior "in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924." There is no showing that the court was given a copy of the agreement. There were no findings of fact or conclusions of law.

In National Life & Accident Insurance Co. v. Parkinson, 10 Cir., 136 F.2d 506, 509, we said:

"Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked."

We have held that the agreement is invalid under § 17 in the absence of congressional action. Mountain Bell would have us hold that the agreement was valid under the action of the district court in dismissing the case without prejudice and making no effort to decide the validity of the agreement. We reject the arguments of res judicata and collateral estoppel.

Pursuant to Rule 56, Fed.R.Civ.P., Mountain Bell moved for a partial summary judgment dismissing the plaintiff's claims for trespass for the period 1928 to date alleging that it is not a trespasser by reason of the April 13, 1928, approval of the Secretary of the Interior. The trial court denied the motion saying, I P. p. 143:

"The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and tele-

graph line was removed. Plaintiff's prayer for punitive damages is denied."

As the Pueblo points out, the commentators generally agree that where there is no genuine issue of fact, the court may enter summary judgment for either party, whether or not such party has made a motion therefor. See 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2720, at 29-30, "the weight of authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56."

Mountain Bell's motion does not address the claimed trespass prior to 1928, and hence the plaintiff's claim for damages for the period prior to 1928 remains at issue.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-841-M Civil

PUEBLO OF SANTA ANA,

Plaintiff,

vs.

MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

Defendant.

**MEMORANDUM OPINION
AND
ORDER**

(Filed June 2, 1982)

This matter arises on cross motions for summary judgment by defendant, Mountain States Telephone and Telegraph Co., (Telephone) and plaintiff Pueblo of Santa Ana (Pueblo). The parties agree and I find that there are no material issues of fact as to the issues presented. The plaintiff is entitled to judgment as a matter of law as to those issues.

The Pueblo seeks damages from the defendant for a trespass which began in 1907 and has continued to the present. The trespass is a telephone and telegraph line constructed by defendant's predecessor across lands held by the Pueblo in fee simple but subject to federal restraints against alienation. Telephone argues it obtained a valid right of way across the Pueblo's land in 1928 pur-

suant to § 17 of the Pueblo Lands Act of June 7, 1924. 43 Stat. 636. Telephone also argues plaintiff's claims are barred by the judgment in *United States as Guardian of the Pueblo of Santa Ana v. Brown*, No. 1814 Equity (D.N.M. 1928). The issues presented are: (1) Did Congress, in § 17 of the Pueblo Lands Act, intend to grant to the Pueblos of New Mexico authority to alienate their land? (2) Are Santa Ana's claims barred by the judgment in *U.S. v. Brown*?

THE PUEBLO LANDS ACT

Section 17 of the Pueblo Lands Act provides:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as herein before determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity and unless the [sic] be first approved by the Secretary of Interior.

It is not disputed that the Secretary, on April 12, 1928, approved the right of way granted to Telephone by the Pueblo. Pueblo argues, however, that Telephone could not obtain a valid right of way pursuant to § 17 because § 17 was an extension of the Indian Non-Intercourse Act to the Pueblos of New Mexico, and not a grant of authority to the Pueblos and the Secretary to alienate Pueblo lands. Pueblo maintains § 17's prohibition against the alienation of Pueblo lands except as Congress may provide in the future and its requirement of Secretarial approval closely parallels and was intended to extend to the Pueblos the

Non-Intercourse Act's requirement of a treaty or convention negotiated by an officer of the United States to alienate Indian lands. Acts of June 30, 1834, 4 Stat. 730 § 12, (codified at 25 U.S.C. 177), and February 27, 1851, 9 Stat. 587. Telephone argues the first clause of § 17 refers to condemnation or other similar takings which Congress may authorize in the future and the second clause was intended by Congress to allow grants of Pueblo lands by the Pueblos so long as the approval of the Secretary was first obtained. A brief discussion of the circumstances surrounding the enactment of the Pueblo Lands Act is necessary to an understanding of the issue.

The Pueblo Lands Act was a congressional response to the confusion created by the Supreme Court's conflicting decisions in *U.S. v. Joseph*, 94 U.S. 614 (1876); *U.S. v. Sandoval*, 231 U.S. 28 (1913); and *U.S. v. Candelaria*, 271 U.S. 432 (1925). In *Joseph*, the issue was whether the Pueblos of the Rio Grande Valley of New Mexico were afforded protections under the Indian Non-Intercourse Acts. Acts of June 30, 1834, 4 Stat. 730, § 12 and February 27, 1851, 9 Stat. 587. The Act of June 30, 1834, among other things, forbade the transfer of Indian lands unless the grant "be made by treaty or convention entered into pursuant to the Constitution." Section 12 also requires that the treaty or convention be negotiated by an officer of the United States. The Act of February 27, 1851 extended the protections of the June 30, 1834 Act to the Indian Tribes of the newly acquired Territory of New Mexico. However, the Court in *Joseph* held the Acts did not apply to the Pueblos of New Mexico because, unlike other Indian Tribes, Pueblo land was owned in fee simple and also because the Pueblo Indians were sophisticated such that federal protections were not required. After

the decision in *Joseph*, the United States made no effort to prevent encroachment on Pueblo lands.

However, the Court again had the opportunity to consider the status of the Pueblos in *Sandoval* and *Candelaria*. In *Sandoval* the Court held that the Pueblo Indians were ethnically and historically "Indians" and that Congress had the power to define them as such in the New Mexico Statehood Enabling Act of June 20, 1910. 36 Stat. 557. In *Candelaria*, a quiet title action, the Court was again presented with the question of the applicability of the Indian Non-Intercourse Acts to the Pueblos. Acts of June 30, 1834 and February 27, 1851. In holding that the Pueblos were afforded the protections of the Non-Intercourse Acts, the Court stated,

While there is no express reference in the provision (the provision prohibiting (sic) settlement on Indian Lands in the Act of 1834) to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians.' Although sedentary, industrious and disposed to peace, they are Indians in race, custom and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of others." 271 U.S. at 442.

The decision in *Candelaria* created uncertainty in New Mexico for those who had settled on Pueblo lands between the time of the decisions in *Joseph* and *Candelaria*. In *Candelaria*, the Court held that the Pueblos were protected by the Non-Intercourse Acts and had been since the Acts were extended to the Pueblos of New Mexico in 1851. Therefore, those who had settled on Pueblo lands in good faith since 1851, were in violation of the Non-Intercourse Acts. The Pueblo Lands Act was Congress' response to this dilemma.

The Act created the Pueblo Lands Board and charged it with the responsibility of investigating title to Pueblo lands and filing actions in Federal District Court to recover certain lands of the Pueblos. Section 3. Other Pueblo lands, where the settlers could establish title under state or territorial law or where they could comply with the statute of limitations contained in Section 4 of the Pueblo Lands Act, were to be awarded to the settlers. Section 5. The Pueblos were to be compensated for property lost to the non-Indian settlers. Section 6.

In the Pueblo Lands Act, Congress was attempting to work an equitable solution to the thorny problem created by uncertainty as to the status of the Pueblo Indians. I am convinced that Congress was also, in § 17, reaffirming through congressional enactment what the Supreme Court decided in *Candelaria*: The Pueblos are Indians and wards of the federal government and Congress intended they be afforded the protections of the Indian Non-Inter-course Acts.

The Tenth Circuit reached a similar conclusion in *Plains Elec. Gen. and Tr. Co-Op v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir. 1976). In *Plains*, the issue was whether Congress had repealed, by implication, a general Pueblo land condemnation statute by its subsequent enactment of a specific, comprehensive scheme for the acquisition of rights of way across Pueblo lands. In holding there had been a repeal, the Court stated,

The history of these statutes (26 U.S.C. §§ 311-328; statutes providing for the acquisition of rights of way across Pueblo lands) reflects an effort to overcome the problems caused by the unique nature of Pueblo Indian land holdings and to provide them with the same protections given the lands of other Indians. The United States Supreme Court has held that Pueb-

lo lands are subject to such protection, *United States v. Candelaria*, [271 U.S. 432 (1925)] and *United States v. Sandoval*, [231 U.S. 28 (1913)], and the intent of Congress to provide such protection cannot be doubted.

Accordingly, I will determine whether Congress intended § 17 to grant to the Pueblos authority to alienate their lands with Secretarial approval, by determining whether such a grant of authority is consistent with the Indian Non-Inter-course Acts, and federal Indian policy generally.

The Constitution rests the power to deal with Indian tribes in the Congress. Included in that power is the exclusive right to extinguish Indian titles. Act of June 30, 1834, 4 Stat. 730; *U.S. v. Santa Fe Pacific Rlwy Co.*, 314 U.S. 339, 347 (1941). Congress' intent to authorize alienation of Indian lands must be clear and express. *Chippewa v. U.S.*, 307 U.S. 1 (1939). Doubtful expressions of congressional intent to authorize alienation of Indian land must be resolved in favor "[of the Indian . . . who is] wholly dependent on its [the federal government's] protection and good faith." *U.S. v. Santa Fe Pacific Rlwy Co.*, at 354. Although Congress may delegate its power, the unilateral action of an officer of the Executive Branch cannot alienate land. Whether Congress intended to delegate its authority to alienate Indian lands must be determined against the "strong background of maintenance of congressional control." *Turtle Mountain Band of Chippewa Indians v. U.S.*, 490 F.2d 935, 946 (Ct. Claims 1974).

By the terms of § 17 of the Pueblo Lands Act, there is no authorization for the grant or sale of Pueblo lands. Although such authorization might be inferred from the Section's requirement of Secretarial approval, I decline to do so. The claimed authorization is not clear and ex-

press. Furthermore, it would be anomalous to conclude that Congress, having expressed its intention to afford the Pueblos the protection of other Indians, abandoned its objective and completely delegated its authority to the Secretary, with no restrictions, unlike other Indian Tribes. Such irrationality and arbitrariness should not be attributed to the Congress that was attempting to solve the problems created by the Supreme Court's erroneous decision in *Joseph. See Morton v. Mancari*, 417 U.S. 535, 548 (1974).

The construction of § 17 offered by the Pueblo is certainly more reasonable. The Secretary has adopted the construction offered by the Pueblo. 25 C.F.R. 121.22 provides:

Tribal Lands. Lands held in trust by the United States for an Indian Tribe. Lands owned by a tribe with federal restrictions against alienation and any other land owned by an Indian Tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the act of Congress authorizing sale provides that approval is unnecessary. (See 25 U.S.C. 177 [Act of June 30, 1834]).

Although the Secretary has not always construed the Act of June 30, 1834 and § 17 of the Pueblo Lands Act to require congressional authorization (apart from § 17) and the approval of the Secretary, as evidenced by the Secretary's approval of the right of way at issue in this case, the Secretary's differing constructions of § 17 illustrates my conclusion that § 17 was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands.

*RES JUDICATA
AND
COLLATERAL ESTOPPEL*

Telephone also argues Pueblo's claim from 1928 to the present is barred by the judgment in *U.S. v. Brown*, No. 1814 Equity (D.N.M. 1928). *Brown* was brought by the United States as guardian of the Pueblo pursuant to § 4 of the Pueblo Lands Act to quiet title to Santa Ana Pueblo lands. In the course of the suit, before Telephone filed its answer, the United States moved to dismiss Telephone on the ground that Telephone had obtained a valid right of way, the right of way at issue here. Dismissal was ordered the day the motion was filed and the order of dismissal did not state whether the dismissal was with or without prejudice. The dismissal is, therefore, without prejudice. Fed.R.Civ.P. 41; *Homeowners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir. 1943).

Telephone argues that Pueblo's claims from 1928 are *res judicata* and that the Pueblo is collaterally estopped from relitigating the validity of the right of way at issue in this case. A final judgment on the merits is essential in order for an action to be *res judicata*. For collateral estoppel to apply, the factual issue must have been actually litigated and necessarily decided. Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* § 4406 at p. 45; *Craft v. Choate*, No. 81-1893 (10th Cir. Slip Opinion, April 5, 1982). There was no judgment on the merits in *Brown* and the validity of Telephone's right of way was not actually litigated or necessarily decided.

Telephone concedes that it was dismissed from the suit on the pretrial motion of the United States, but it maintains that the dismissal should be afforded the status of a judgment on the merits because of the Court's obser-

vation in the order of dismissal that "it appear[ed] to the court that since the institution of this suit, said defendant has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928 by the Secretary of Interior in accordance with the provisions of § 17 of the Pueblo Lands Act of June 7, 1924."

I am not convinced that the court's observation as to the reasons the United States moved for dismissal should elevate the order of dismissal to the status of an order on the merits. Substance must govern over form. The order of dismissal in *Brown* was not an order on the merits and the issue of the validity of Telephone's right of way was not actually litigated and necessarily decided. It is not uncommon for a court to state in its order of dismissal the reason plaintiff moved for the dismissal. Plaintiff's claims are not *res judicata* and the factual issues present in those claims are not precluded by collateral estoppel.

In conclusion, § 17 of the Pueblo Lands Act was intended by Congress to reaffirm the protections afforded the Pueblos under the Acts of June 30, 1834 and February 27, 1851. It was not intended to grant to the Pueblos and the Secretary *carte blanc* to alienate Pueblo lands for any reason. Plaintiff's claims are not barred by the judgment in *U.S. v. Brown*. The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied.

/s/ E. L. Mechem
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-841-M Civil

PUEBLO OF SANTA ANA,
Plaintiff,

vs.

MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

Defendant.

O R D E R

(Filed July 13, 1982)

This matter arises for consideration on defendant's motion to certify an interlocutory appeal of my order of June 2, 1982, pursuant to 28 U.S.C. 1292(b) (1976). Having considered the motion and being otherwise advised in the premises, I find that the issue determined in that order involves a controlling question of law as to which there is substantial ground for difference of opinion. I further find that an immediate appeal may materially advance the ultimate termination of the litigation. Now, Therefore,

IT IS ORDERED that defendant is hereby granted an interlocutory appeal from my order of June 2, 1982 pursuant to 28 U.S.C. 1292(b) (1976).

/s/ E. L. Mechem
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

Tenth Circuit
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

Howard K. Phillips
Clerk

Telephone
(303) 837-3157
(303) 327-3157

May 14, 1984

Ms. Kathryn Marie Krause
Mr. Stuart S. Gunckel
Mr. John R. Stoller
Mountain States Telephone and Telegraph
Suite 1300, 931 14th Street
Denver, Colorado 80202

Mr. H. Perry Ryon
Attorney at Law
P. O. Box 400, Station 733
Albuquerque, New Mexico 87103

Re: 83-1220, Pueblo of Santa Ana vs. Mountain States
Telephone and Telegraph, et al

Dear Counsel:

Enclosed is a copy of the opinion of the Court in the captioned cause. Judgment in accordance with the opinion has been entered today.

Sincerely yours,

/s/ Howard K. Phillips, Clerk

HKP/mju
enc.

APPENDIX D

Act June 7, 1924, c. 331, 43 Stat. 636, as amended by Act May 31, 1933, c. 45, § 7, 48 Stat. 111, provided:

"1. That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the United States of America, in its sovereign capacity as guardian of said Pueblo Indians shall, by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined.

"2. That there shall be, and hereby is, established a board to be known as 'Pueblo Lands Board' to consist of the Secretary of the Interior, the Attorney General, each of whom may act through an assistant in all hearings, investigations, and deliberations in New Mexico, and a third member to be appointed by the President of the United States. The board shall be provided with suitable quarters in the city of Santa Fe, New Mexico, and shall have power to require the presence of witnesses and the production of documents by subpoena, to employ a clerk who shall be empowered to administer oaths and take acknowledgments, shall employ such clerical assistance, interpreters, and stenographers with such compensation as the Attorney General shall deem adequate, and it shall be provided with such necessary supplies and equipment as it may require on requisitions to the Department of Justice. The compensation and allowance for travel and expenses of the

member appointed by the President shall be fixed by the Attorney General.

"It shall be the duty of said board to investigate, determine, and report and set forth by metes and bounds, illustrated where necessary by field notes and plats, the lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the said board shall find not to have been extinguished in accordance with the provisions of this Act, and the board shall not include in their report any claims of non-Indian claimants who, in the opinion of said board after investigation, hold and occupy such claims of which they have had adverse possession, in accordance with the provisions of section 4 of this Act: Provided, however, That the board shall be unanimous in all decisions whereby it shall be determined that the Indian title has been extinguished.

"The board shall report upon each pueblo as a separate unit and upon the completion of each report one copy shall be filed with the United States District Court for the District of New Mexico, one with the Attorney General of the United States, one with the Secretary of the Interior, and one with the Board of Indian Commissioners.

"3. That upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in the United States District Court for the District of New Mexico, as provided in section 1 of this Act, a suit to quiet title to the lands described in said report as Indian lands the Indian title to which is determined by said report not to have been extinguished.

"4. That all persons claiming title to, or ownership of, any lands involved in any such suit, or suits, may in addition to any other legal or equitable defenses which they may have or have had under the laws of the Territory and State of New Mexico, plead limitation of action, as follows, to wit:

"(a) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed, under color of title from the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation, or adverse possession of the Territory or of the State of New Mexico, since the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

"(b) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed with claim of ownership, but without color of title from the 16th day of March, 1889, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation or adverse possession of the Territory or of the State of New Mexico, from the 16th day of March, 1899, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

"Nothing in this Act contained shall be construed to impair or destroy any existing right of the Pueblo Indians of New Mexico to assert and maintain unaffected by the provisions of this Act their title and right to any land by original proceedings, either in law or equity, in any court of competent jurisdiction and any such right may be asserted at any time prior to the filing of the field notes and plats as provided in section 13 hereof, and jurisdiction with respect to any such original proceedings is hereby conferred upon the United States District Court for the District of New Mexico with right of review as in other cases: Provided, however, That any contract entered into with any attorney or attorneys by the Pueblo Indians of New Mexico, to carry on such litigation shall be subject to and in accordance with existing laws of the United States.

"5. The plea of such limitations, successfully maintained, shall entitle the claimants so pleading to a decree in favor of them, their heirs, executors, successors, and assigns for the premises so claimed by them, respectively, or so much thereof as may be established, which shall have the effect of a deed of quit-claim as against the United States and said Indians, and a decree in favor of claimants upon any other ground shall have a like effect.

"The United States may plead in favor of the pueblo, or any individual Indian thereof, as the case might be, the said limitations hereinbefore defined.

"6. It shall be the further duty of the board to separately report in respect of each such pueblo—

"(a) The area and character of any tract or tracts of land within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico and the

extent, source, and character of any water right appurtenant thereto in possession of non-Indian claimants at the time of filing such report, which are not claimed for said Indians by any report of the board.

"(b) Whether or not such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians. Seasonable prosecution is defined to mean prosecution by the United States within the same period of time as that within which suits to recover real property could have been brought under the limitation statutes of the Territory and State of New Mexico.

"(c) The fair market value of said water rights and of said tract or tracts of land (exclusive of any improvements made therein or placed thereon by non-Indian claimants) whenever the board shall determine that such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians, and the amount of loss, if any, suffered by said Indians through failure of the United States seasonably to prosecute any such right.

"The United States shall be liable, and the board shall award compensation, to the pueblo within the exterior boundaries of whose lands such tract or tracts of land shall be situated or to which such water rights shall have been appurtenant to the extent of any loss suffered by said Indians through failure of the United States seasonably to prosecute any right of the United States or of said Indians, subject to review as herein provided. Such report and

award shall have the force and effect of a judicial finding and final judgment upon the question and amount of compensation due to the Pueblo Indians from the United States for such losses. Such report shall be filed simultaneously with and in like manner as the reports hereinbefore provided to be made and filed in section 2 of this Act.

"At any time within sixty days after the filing of said report with the United States District Court for the District of New Mexico as herein provided the United States or any pueblo or Indians concerned therein or affected thereby may, in respect of any report upon liability or of any finding of amount or award of compensation set forth in such report, petition said court for judicial review of said report, specifying the portions thereof in which review is desired. Said court shall thereupon have jurisdiction to review, and shall review, such report, finding, or award in like manner as in the case of proceedings in equity. In any such proceeding the report of the board shall be prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be rebutted by competent evidence. Any party in interest may offer evidence in support or in opposition to the findings in said report in any respect. Said court shall after hearing render its decision so soon as practicable, confirming, modifying, or rejecting said report or any part thereof. At any time within thirty days after such decision is rendered said court shall, upon petition of any party aggrieved, certify the portions of such report, review of which has been sought, together with the record in connection therewith, to the United States Circuit Court of Appeals for the Eighth Circuit, which shall have jurisdiction to consider, review, and decide all questions arising upon such report

and record in like manner as in the case of appeals in equity, and its decision thereon shall be final.

"Petition for review of any specific finding or award of compensation in any report shall not affect the finality of any findings nor delay the payment of any award set forth in such report, review of which shall not have been so sought, nor in any proceeding for review in any court under the provisions of this section shall costs be awarded against any party.

"7. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior who shall report to the Congress of the United States, together with his recommendation, the fair market value of lands, improvements appurtenant thereto, and water rights of non-Indian claimants who, in person or through their predecessors in title prior to January 6, 1912, in good faith and for a valuable consideration purchased and entered upon Indian lands under a claim of right based upon a deed or document purporting to convey title to the land claimed or upon a grant, or license from the governing body of a pueblo to said land, but fail to sustain such claim under the provisions of this Act, together with a statement of the loss in money value thereby suffered by such non-Indian claimants. Any lands lying within the exterior boundaries of the pueblo of Nambe land grant, which were conveyed to any holder or occupant thereof or his predecessor or predecessors in interest by the governing authorities of said pueblo, in writing, prior to January 6, 1912, shall unless found by said board to have been obtained through fraud or deception, be recognized as constituting valid claims by said board and by said courts, and disposed of in such manner as lands the Indian title to which has

been determined to have been extinguished pursuant to the provisions of this Act: Provided, That nothing in this section contained with reference to the said Nambe Pueblo Indians shall be construed as depriving the said Indians of the right to impeach any such deed or conveyance for fraud or to have mistakes therein corrected through a suit in behalf of said pueblo or of an individual Indian under the provisions of this Act.

"8. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior the area and the value of the lands and improvements appurtenant thereto of non-Indian claimants within or adjacent to Pueblo Indian settlements or towns in New Mexico, title to which in such non-Indian claimants is valid and indefeasible, said report to include a finding as to the benefit to the Indians in anywise of the removal of such non-Indian claimants by purchase of their lands and improvements and the transfer of the same to the Indians, and the Secretary of the Interior shall report to Congress the facts with his recommendations in the premises.

"9. That all lands, the title to which is determined in said suit or suits, shall, where necessary, be surveyed and mapped under the direction of the Secretary of the Interior, at the expense of the United States, but such survey shall be subject to the approval of the judge of the United States District Court for the District of New Mexico, and if approved by said judge shall be filed in said court and become a part of the decree or decrees entered in said district court.

"10. That necessary costs in all original proceedings under this Act, to be determined by the court, shall be

taxed against the United States and any party aggrieved by any final judgment or decree shall have the right to a review thereof by appeal or writ of error or other process, as in other cases, but upon such appeal being taken each party shall pay his own costs.

"11. That in the sense in which used in this Act the word 'purchase' shall be taken to mean the acquisition of community lands by the Indians other than by grant or donation from a sovereign.

"12. That any person claiming any interest in the premises involved but not impleaded in any such action may be made a party defendant thereto or may intervene in such action, setting up his claim in usual form.

"13. That as to all lands within the exterior boundaries of any lands granted or confirmed to the Pueblo Indians of New Mexico, by any authority of the United States of America or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise and which have not been claimed for said Indians by court proceedings then pending or the findings and report of the board as herein provided, the Secretary of the Interior at any time after two years after the filing of said reports of the board shall file field notes and plat for each pueblo in the office of the surveyor general of New Mexico at Santa Fe, New Mexico, showing the lands to which the Indian title has been extinguished as in said report set out, but excluding therefrom lands claimed by or for the Indians in court proceedings then pending, and copies of said plat and field notes certified by the surveyor general of New Mexico as true and correct copies shall be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and in-

terest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same. And the Secretary of the Interior within thirty days after the Indians' right to bring independent suits under this Act shall have expired, shall cause notice to be published in some newspaper or newspapers of general circulation issued, if any there be, in the county wherein lie such lands claimed by non-Indian claimants, respectively, or wherein some part of such lands are situated, otherwise in some newspaper or newspapers of general circulation published nearest to such lands, once a week for five consecutive weeks, setting forth as nearly as may be the names of such non-Indian claimants of land holdings not claimed by or for the Indians as herein provided, with a description of such several holdings, as shown by a survey of Pueblo Indian lands heretofore made under the direction of the Secretary of the Interior and commonly known as the 'Joy Survey,' or as may be otherwise shown or defined by authority of the Secretary of the Interior, and requiring that any person or persons claiming such described parcel or parcels of land or any part thereof, adversely to the apparent claimant or claimants so named as aforesaid, or their heirs or assigns, shall, on or before the thirtieth day after the last publication of such notice, file his or their adverse claim in the United States Land Office in the land district wherein such parcel or parcels of land are situate, [sic] in the nature of a contest, stating the character and basis of such adverse claim, and notice of such contest shall be served upon the claimant or claimants named in the said notice, in the same manner as in cases of contest of homestead entries. If no such contest is instituted as aforesaid, the Secretary of the Interior shall issue to the claimant or

claimants, or their heirs or assigns, a patent or other certificate of title for the parcel or parcels of land so described in said notice; but if a contest be filed it shall proceed and be heard and decided as contests of homestead entries are heard and decided under the rules and regulations of the General Land Office pertinent thereto. Upon such contest either party may claim the benefit of the provisions of section 4 of this Act to the same extent as if he were a party to a suit to quiet title brought under the provisions of this Act, and the successful party shall receive a patent or certificate of title for the land as to which he is successful in such proceeding. Any patent or certificate of title issued under the provisions of this Act shall have the effect only of a relinquishment by the United States of America and the said Indians.

"If after such notice more than one person or group of persons united in interest makes claim in such land office adverse to the claimant or claimants named in the said notice, or to any other person or group of persons who may have filed such contest, each contestant shall be required to set forth the basis and nature of his respective claim, and thereupon the said claims shall be heard and decided as upon an original contest or intervention.

"And in all cases any person or persons whose right to a given parcel or parcels of land has become fixed either by the action of the said board or the said court or in such contest may apply to the Commissioner of the General Land Office for a patent or certificate of title and receive the same without cost or charge.

"14. That if any non-Indian party to any such suit shall assert against the Indian title a claim based upon a

Spanish or Mexican grant, and if the court should finally find that such claim by the non-Indian is superior to that of the Indian claim, no final decree or judgment of ouster of the said Indians shall be entered or writ of possession or assistance shall be allowed against said Indians, or any of them, or against the United States of America acting in their behalf. In such case the court shall ascertain the area and value of the land thus held by any non-Indian claimant under such superior title, excluding therefrom the area and value of lots or parcels of land the title to which has been found to be in other persons under the provisions of this Act: Provided, however, That any findings by the court under the provisions of this section may be reviewed on appeal or writ of error at the instance of any party aggrieved thereby, in the same manner, to the same extent, and with like effect as if such findings were a final judgment or decree. When such finding adverse to the Indian claim has become final, the Secretary of the Interior shall report to Congress the facts, including the area and value of the land so adjudged against the Indian claim, with his recommendations in the premises.

"15. That when any claimant, other than the United States for said Indians not covered by the report provided for in section 7 of this Act, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, purchase, or donation under the provisions of this Act, but has held and occupied any such parcel in good faith, claiming the same as his own, and the same has been improved, the value of the improvements upon the said parcel of land shall be found by the court and reported by the Secretary of the Interior to Congress, with his recommendations in the premises.

"16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

"17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the lands of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

"18. That the pleading, practice, procedure, and rules of evidence shall be the same in all causes arising under this Act as in other civil causes in the Federal courts, except as otherwise herein provided.

"19. That all sums of money which may hereafter be appropriated by the Congress of the United States for the

purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any Pueblo or to any of the Indians of any pueblo, shall be paid over to the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost to said pueblo or to said Indians, or for purchase or construction of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians."

APPENDIX E

Act of June 30, 1834, c. 161, Section 12, 4 Stat. 730,
25 U.S.C. § 177

Purchases or grants of lands from Indians

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

APPENDIX F

In addition to the instant lawsuit involving the Pueblo of Santa Ana and Mountain Bell, in December of 1982 the following lawsuits were filed:

1. *United States of America on behalf of the Pueblos of Santa Clara and San Ildefonso, Plaintiffs v. Jemez Mountain Electric Co-op, Defendant* (CV-82-1482(M)).
2. *Pueblo of Isleta, Plaintiff v. James Watt, Secretary of the Interior; Garrey Carruthers, Assistant Secretary of Interior—Land and Water Resources; Robert N. Broadbent, Commissioner of the Bureau of Reclamation; U.S. Department of the Interior; Middle Rio Grande Conservancy District, Defendants* (CV-82-1504(C)).
3. *United States of America, on behalf of the Pueblos of Acoma, Isleta, Jemez, Laguna, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Clara, Santa Domingo, Tesuque, Taos and Zia, Plaintiffs v. Mountain States Telephone and Telegraph Co., Inc., and Continental Telephone Company of the West, Defendants* (CV-82-1513(C)).*
4. *Pueblo of Sandia, Plaintiff v. Western Union Telegraph Co. and Postal Telegraph-Cable Co., Defendants* (CV-82-1521(M)).
5. *Pueblo of Sandia, Plaintiff v. New Mexico State Highway Commission and New Mexico State Highway Department; Board of County Commissioners of Bernalillo County, New Mexico; Board of County Commissioners of Sandoval*

* Mountain Bell has entered into Agreement with the Pueblos of Picuris and Pojoaque and has, or will soon be, dismissed from this action as to those Pueblos.

County, New Mexico; and State of New Mexico; and State of New Mexico, Defendants (CV-82-1522(C)).

6. *Pueblo of Sandia, Plaintiff v. Mountain States Telephone and Telegraph Company; Colorado Telephone Company; Tri-State Telephone and Telegraph Company; Rocky Mountain Bell Telephone Company, Defendants* (CV-82-1528(M)).
7. *Pueblo of Isleta, Plaintiff v. Gas Company of New Mexico; New Mexico Gas Company; Southern Union Gas Company; Southern Union Company, Defendants* (CV-82-1532(C)).
8. *Pueblo of Isleta, Plaintiff v. Western Union Telegraph Co. & Postal Telegraph-Cable Co., Defendants* (CV-82-1533(M)).
9. *Pueblo of Isleta, Plaintiff v. Public Service Company of New Mexico, and Albuquerque Gas and Electric Company, Defendants* (CV-82-1535(C)).
10. *Pueblo of Sandia, Plaintiff v. James Watt, Secretary of the Interior; Garrey Carruthers, Assistant Secretary of Interior—Land and Water Resources; Robert N. Broadbent, Commissioner of the Bureau of Reclamation; U.S. Department of the Interior; Middle Rio Grande Conservancy District, Defendants* (CV-82-1536(M)).
11. *Pueblo of Isleta, Plaintiff v. Atchison, Topeka and Santa Fe Ry. Co., Defendant* (CV-82-1537(C)).
12. *Pueblo of Isleta, Plaintiff v. Mountain States Telephone and Telegraph Company; Colorado Telephone Company; Tri-State Telephone and Telegraph Company; Rocky Mountain Bell Telephone Company, Defendants* (CV-82-1539(M)).
13. *Pueblo of Sandia, Plaintiff v. Margaret Ann Willington, et vir., Eugenio C. Tapia et ux., Reese Caudill et ux., Jerry D. Winker et ux., William E. Proffer et ux., William A. Gateley et ux., Eugene*

C. Gunther et ux., Diana Baca et vir., Paul E. Deardeuff et ux., Detlef Z. H. Phillips et ux., Marion E. Brown et ux., and Unknown Claimants of Interest in the Premises Adverse to that of the Plaintiff, Defendants (CV-82-1543(C)).

14. *Pueblo of San Juan, Plaintiff v. Mountain States Telegraph and Telephone Co. and Mountain States Telephone Co.; Continental Telephone Co. of the West; Trampas Lumber Co.; Federal Tie and Lumber Co.; Espanola Telephone Co., Defendants (CV-82-1547(C)).*
 15. *Pueblo de Acoma, Plaintiff v. Atchinson Topeka and Santa Fe Ry. Co., Defendant (CV-82-1550 (JB)).*
 16. *Pueblo de Acoma, Plaintiff v. New Mexico and Arizona Land Company; State of New Mexico, Defendants (CV-82-1551 (JB)).*
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SEP 14 1984

ALEXANDER L. STEVAS,
CLERK

No. 84-262

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

On Petition for Writ of Certiorari to
The United States Court of Appeals
for the Tenth Circuit

BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Richard W. Hughes
(Counsel of Record)
Scott E. Borg
Luebben, Hughes & Tomita
201 Broadway SE
Albuquerque, NM 87102

Counsel for Respondent

September 12, 1984

QUESTIONS PRESENTED

1. Did Congress, in a section of a now obsolete statute addressed solely to the Pueblo Indians of New Mexico that was intended to reaffirm Congress' exclusive control over conveyances of Indian land as embodied in the Indian Non-Intercourse Act, empower the Secretary of the Interior unconditionally to approve conveyances of Pueblo land of unlimited scope?

2. Can a voluntary dismissal of a non-appearing defendant, for reasons unrelated to the merits of the action and necessarily without prejudice, be interposed as bar to judicial inquiry into the legal effect of the circumstances that led to the voluntary dismissal?

TABLE OF CONTENTS

	<u>Page</u>
QUESTIONS PRESENTED.....	1
TABLE OF AUTHORITIES.....	iii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	5
ARGUMENT	7
I. The Interpretation Of Section 17 Reached by Both Courts Below Is Clearly Correct, Consistent With The Purposes Of The Pueblo Lands Act And The Non-Intercourse Act, And Not Worthy Of Review By This Court	7
II. Mountain Bell's Voluntary Dismissal From <u>United States</u> <u>v. Brown</u> Cannot Preclude Consideration Of the Validity Of The Right-Of-Way At Issue Herein	26
CONCLUSION	41
APPENDIX.....	App.1
Letter from George A.H. Frazer to Attorney General, Feb. 27, 1926, National Archives, Rec. Grp. 60, file 210663, sub. 2.....	App.1
Letter from F.C. Wilson to C.H. Burke, Dec. 18, 1923, Gen. Services Files 45918-1921-013, Pt. 8.....	App.12

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
<u>A.B. Dick Co. v. Marr</u> , 197 F.2d 498 (2d Cir. 1952).....	33
<u>Alonzo v. United States</u> , 249 F.2d 189 (10th Cir. 1957).....	14
<u>Arizona v. California</u> , 460 U.S. 605 (1983).....	26,27
<u>Brunswick Corp. v. Chrysler Corp.</u> , 408 F.2d 335 (7th Cir. 1968).....	36
<u>Bryan v. Itasca County</u> , 426 U.S. 373 (1976).....	17
<u>Ex parte Skinner & Eddy Corp</u> , 265 U.S. 86 (1924).....	32
<u>Garcia v. United States</u> , 43 F.2d 873 (10th Cir. 1930).....	35
<u>Home Owners Loan Corp v. Hoffman</u> , 134 F.2d 314 (8th Cir. 1943).....	40
<u>In re Piper Aircraft Distrib.</u> <u>Sys. Antitrust Litigation</u> , 551 F.2d 213 (8th Cir. 1977).....	33
<u>Jones v. S.E.C.</u> , 297 U.S. 19 (1936).....	32
<u>Johnson v. McIntosh</u> , 21 U.S. (8 Wheat.) 543 (1823).....	7
<u>McGowan v. Columbia Rivers Packers</u> <u>Ass'n</u> , 245 U.S. 252 (1917).....	33
<u>Mitchel v. United States</u> , 34 U.S. (9 Pet.) 711 (1835).....	7

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
<u>Montana v. United States</u> , 440 U.S. 147 (1979).....	27
<u>National Life & Accident Insurance Co. v. Parkinson</u> , 136 F.2d 506 (10th Cir. 1943).....	37-39
<u>Nevada v. United States</u> , _____ U.S. _____, 103 S.Ct. 2906 (1983).....	26,27
<u>Oneida Indian Nation v. County of Oneida</u> , 414 U.S. 661 (1974).....	7
<u>Piper v. Chris-Craft Industries Inc.</u> , 430 U.S. 1 (1977).....	23
<u>Plains Electric Gen. & Trans. Co-Op v. Pueblo of Laguna</u> , 542 F.2d 1375 (10th Cir. 1976).....	16
<u>United States v. Brown</u> , No. 1814 Equity (D.N.M., decree entered May 31, 1929).....	4,6,28 29,33 34,37
<u>United States v. Candelaria</u> , 271 U.S. 432 (1926).....	7,9
<u>United States v. Clark</u> , 454 U.S. 555 (1982).....	23
<u>United States v. National Ass'n of Securities Dealers</u> , 422 U.S. 694 (1975).....	23
<u>United States v. Sandoval</u> , 231 U.S. 28 (1913).....	8,9

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
<u>United States v. Santa Fe Pacific Railroad</u> , 314 U.S. 339 (1941).....	7
<u>Statutes and Regulations:</u>	
Act of April 21, 1928, 45 Stat. 442, 25 U.S.C. § 322.....	3,15 16,20
1926 Condemnation Act, Act of May 10, 1926, 44 Stat. 498.....	15, 16
Non-Intercourse Act, 25 U.S.C. § 177.....	passim
Pueblo Lands Act, Act of June 7, 1924, 43 Stat. 636, (esp. Section 17).....	passim
25 U.S.C. §§ 311-328.....	
25 U.S.C. § 323.....	21,25
25 C.F.R. Pt. 169.....	21
25 C.F.R. § 121.22.....	24
<u>Rules:</u>	
Rule 17.2(c), R.S.Ct.....	25
Rule 41, F.R.Civ.P.....	40

TABLE OF AUTHORITIES (continued)

	<u>Page</u>
<u>Miscellaneous:</u>	
<u>Felix Cohen's Handbook of</u> <u>Federal Indian Law (1982 ed.)</u> pp. 508-522.....	8,15

No.84-262

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This proceeding involves the proper interpretation of one section of a now obsolete statute passed in 1924 by Congress to deal with a temporary problem concerning certain lands of the Pueblo Indians of New Mexico. The relevant section, Section 17 of the Pueblo Lands

(never codified), was explicitly intended by Congress to reaffirm the applicability of the principles of the Indian Non-Intercourse Act (now codified at 25 U.S.C. §177) to the lands of the Pueblo Indians. Shortly after it was enacted, however, a lawyer acting on behalf of a small railroad that had built a line across Pueblo land without a valid right-of-way persuaded local federal officials that Section 17 could be read as a grant of authority to the Secretary of the Interior to approve rights-of-way over Pueblo lands, rather than as the restriction on conveyances that Congress intended it to be. This interpretation, reached as an accommodation of a financially troubled company, was followed as a way of validating several other invalid rights-of-way (including that involved in the instant case) during the next few years, as it was not until 1928 that Congress enacted proper authority for

rights-of-way over Pueblo lands. Act of April 21, 1928, 45 Stat. 442 (now codified at 25 U.S.C. §322).

The telephone line at issue in this proceeding was constructed over land of respondent Pueblo of Santa Ana (hereinafter, "Santa Ana"), a federally recognized Indian tribe, in 1905 by a predecessor of petitioner Mountain States Telephone and Telegraph Co. (hereinafter, "Mountain Bell"), without authority from the United States or the consent of Santa Ana. When, in 1927, the United States sued to quiet Santa Ana's title to its lands under the procedures of the Pueblo Lands Act, Mountain Bell was named as one of many defendants, because of its lack of any valid right-of-way. Mountain Bell never answered or appeared in the case. Rather, it did as other companies had done at the time, and obtained approval by the Secretary under Section 17 of a right-of-way to which it had obtained the

Pueblo's agreement, following which the United States Attorney voluntarily dismissed it from the suit.

The instant action was brought to challenge the validity of that right-of-way. Mountain Bell argued below that Section 17 constituted a general grant of authority to the Secretary to approve any type of conveyance of Pueblo lands, and that regardless, Mountain Bell's voluntary dismissal from United States v. Brown, No. 1814 Equity (D.N.M., decree entered May 31, 1929) precluded any inquiry into the validity of the right-of-way. The district court and the court of appeals, both of which have long experience and expertise in cases concerning the often unique legal issues affecting the New Mexico Pueblo Indians, agreed that the interpretation of Section 17 advanced by Mountain Bell was utterly contrary to its clear language and the intent of Congress, and that a voluntary

dismissal cannot have preclusive effect under the facts of this case. Mountain Bell now seeks to bring this rather inconsequential question before this Court, asserting reasons that have no basis in fact or law.

SUMMARY OF ARGUMENT

Section 17 was intended only to reaffirm the applicability of the Indian Non-Intercourse Act to the Pueblo Indians. It was never meant to be a grant of authority to the Secretary to approve conveyances, and such an interpretation is at variance with the language of the section, the language of other laws that do grant such authority, and the fact that Congress soon afterwards acted twice to provide for acquisition of rights-of-way over Pueblo lands. There is no "consistent administrative practice" supporting Mountain Bell's position: resort to Section 17 was actually brief

and sporadic. Mountain Bell's voluntary dismissal from United States v. Brown is entitled to no preclusive effect. It was not a consent decree or an adjudication on the merits, and under settled law it was without prejudice. The decisions below to this effect raise no important or novel issues of federal law requiring this Court's attention, conflict with no decisions of this Court or other courts of appeals, and are manifestly correct. Finally, while of some importance to respondent and a few other Pueblos, and to the handful of companies still using easements purportedly approved under Section 17, the decisions below are of utterly no consequence to anyone else, as the statute is now obsolete. This entire dispute is, indeed, primarily of historical interest.

ARGUMENT

I. The Interpretation Of Section 17 Reached By Both Courts Below Is Clearly Correct, Consistent With The Purposes Of The Pueblo Lands Act And The Non-Intercourse Act, And Not Worthy Of Review By This Court.

Both courts below held that Section 17 of the Pueblo Lands Act is merely what it appears to be, a reaffirmation by Congress that Pueblo lands are fully protected by the special federal legal doctrines applicable to Indian lands¹, and that the

¹ The special status accorded Indian land by virtue of the federal trusteeship has been often noted by this Court. The principal decisions include Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823); Mitchel v. United States, 34 U.S. (9 Pet.) 711 (1835); United States v. Santa Fe Pacific Railroad, 314 U.S. 339 (1941); Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). As to Pueblo land, the lead case is United States v. Candelaria, 271 U.S. 432 (1926). In general, the cases hold that Indian land is held by the United States in trust for Indian

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extraordinary exceptions to those doctrines embodied in that Act were a one-time act of grace for non-Indians who had settled on Pueblo lands unlawfully.²

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people (or, as in the case of the Pueblos, owned by the Pueblos subject to a restriction on alienation), and that no interest in such lands may be lost, transferred or conveyed without express authority from Congress. Since the early days of the republic, this doctrine, derived from rules of international law, has been embodied in federal statutory law, now codified at 25 U.S.C. §177, the so-called "Non-Intercourse Act." See generally, Felix Cohen's Handbook of Federal Indian Law (1982 ed.) [hereinafter "Cohen"], at 508-522.

² The situation arose out of uncertainty over whether Pueblo lands were indeed "Indian" lands within the meaning of federal Indian law. In United States v. Sandoval, 231 U.S. 28 (1913), this Court clearly held that the Pueblos were Indians, although the case did not address the issue of alienation of land. Prior to that decision, thousands of non-Indians had occupied Pueblo lands. Anticipating that after Sandoval, their occupancy would be held to be invalid, and that these persons would be evicted, Congress in 1921 began consideration of a means of validating their possessory rights. The focus of a storm of controversy in New Mexico and among pro-Indian interests for three years, the process finally led

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Mountain Bell's strident and often contrived argument that these rulings are bizarre departures from settled law will not wash; rather, the record shows that the resort to Section 17 as authority to approve rights-of-way was the departure. The idea that Section 17 could be viewed as a grant of power originated with Chicago bond lawyer Melvin Hawley, who prevailed upon government lawyers in New Mexico, and eventually the Commissioner of Indian Affairs, all of whom were anxious to avoid financial difficulty and public embarrassment for the various railroads and utilities that had constructed lines over Pueblo lands without lawful

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to enactment of the Pueblo Lands Act, 42 Stat. 636 (1924). See Pet.App. 16-18. Section 17 of the Act set forth what had been implied in Sandoval, and which this Court expressly affirmed - without reference to the Pueblo Lands Act - in United States v. Candelaria, 271 U.S. 432 (1926), that any alienation of Pueblo land without the express approval of Congress was void.

authority.³ It is this bizarre interpretation, fabricated by interests seeking to avoid accountability to the Pueblos, that Mountain Bell now asks this Court to enshrine.

Section 17 states:

17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner

³ There is extensive correspondence documenting these facts in government archives. While not necessary to the decisions of the courts below, they refute Mountain Bell's arguments in its petition herein as to whether the decisions below are consistent with decisions of this Court and with "established construction" of Section 17 by the Department of the Interior. For that reason, Santa Ana has included in the appendix to this brief, at App. 1, one of the principal letters, from George A. H. Fraser, Special Assistant to the Attorney General, who represented the United States in the Pueblo Lands Act cases, to the Attorney General, in which Mr. Fraser describes the meeting at which at which this interpretation was arrived at, as well as his own doubts on the subject. George A. H. Fraser to Attorney General, February 27, 1926, National Archives, Rec. Grp. 60, file 210663, sub. 2.

except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

Clearly, the section has two parts, joined by the conjunctive "and".⁴ Mountain Bell claims that only its interpretation of the section gives proper meaning to both clauses, but that interpretation has no support in the explanation of the section's meaning given by the author of the language. Francis C.

⁴ Mountain Bell makes much of the significance of the comma located in front of the "and", Pet. at 10, n. 1, arguing that its presence supports the contention that the two clauses are independent, not dependent. Given the bulk and complexity of the first clause, however, it is apparent that the section as a whole would be unreadable without the comma. It is highly doubtful that the comma's presence can be relied on for any particular interpretation of the section, and the court below made no reference to it.

Wilson had been Special United States Attorney for the Pueblos, and was deeply involved in the protracted debates, in Congress and out, over the Pueblo Lands Act. In late 1923 he proposed several changes in the bill including three new sections, one of which, almost alone among provisions of this much-revised bill, was ultimately enacted without dispute in the very language in which it was originally drafted. That was Section 17. In a letter to Indian Affairs Commissioner Charles Burke on December 18, 1923, Wilson stated that Section 17 was intended to "prevent existing conditions [i.e., the unauthorized occupancy of Pueblo lands by non-Indians] from recurring or existing again," and to "cover the same ground as Section 2116 of the Revised Statutes [the Non-Intercourse Act, now 25 U.S.C. §177] but ... changed so as to accord with the

conditions of the Pueblo Indians."⁵

A careful examination of Section 17 shows that that is just what it does. Like the Non-Intercourse Act, it specifies that no interest may be acquired in the lands of any Pueblo "except as may hereafter be provided by Congress" (emphasis added), and that no such conveyance will in any event be valid without prior approval of the Secretary of the Interior. The section thus declares what has long been settled law, that only Congress may authorize an alienation of

⁵ F.C. Wilson to C.H. Burke, Dec. 18, 1923, Gen. Services Files 45918-1921-013, Pt. 8. This letter was located in government archives too late for inclusion in the record below, but it appears to be the only contemporary document discussing the meaning and purpose of Section 17. Because of that, and because it completely confirms the interpretation of the Section reached by both courts below, the relevant portion of the letter (the complete document is 13 pages, only the first two of which concern the bill) is reproduced in the appendix to this brief, at App. 12.

any interest of Indian lands,⁶ and adds to that a passage underlining the special duties of the Secretary of the Interior in the actual execution of the government's trusteeship over those lands. Nowhere in the writings of Wilson or in any discussion of the Act while it was before Congress was there any suggestion that Section 17 was intended as a grant of power to the Secretary. Its purpose, like that of 25 U.S.C. §177, was to prevent alienation of Indian land except under authority provided by Congress. In what is apparently the only previous case to interpret the section directly, it was viewed in precisely that way. Alonzo v. United States, 249 F.2d 189, 195-196 (10th

⁶ See, e.g., cases cited at n. 1, supra. That the section may only have reaffirmed existing law does not render it "meaningless", as Mountain Bell claims. Given the uncertainties of the context, see n. 2, supra, this attempt to clarify the situation was reasonable. Cf. Bryan v. Itasca County, 426 U.S. 373, 391-392 (1976).

Cir. 1957). And see Cohen, supra, n. 1, at 511-512. The recent edition of Cohen, the leading treatise on federal Indian law, specifically cites Section 17 as a statute that "supplement[s] the general restraint on alienation in section 177 ... to prohibit conveyances with respect to particular tribes." Id. at 516, n. 47 and accompanying text.

That Section 17 cannot be read as a broad grant of authority for all kinds of conveyances by Pueblos is conclusively demonstrated by Congress' subsequent actions to provide for acquisition of rights-of-way over Pueblo lands, a lengthy history carefully avoided in Mountain Bell's petition. In 1926 Congress enacted authority for condemnation of Pueblo lands for public purposes, by the Act of May 10, 1926, 44 Stat. 498. After a federal judge held that Act to be defective, Congress passed the Act of April 21, 1928, 45 Stat. 442 (now codified as amended at 25 U.S.C.

§322), which specifically made applicable to the Pueblos the existing federal statutes authorizing grants of rights-of-way over the lands of other Indian tribes.⁷ As discussed in Plains Electric Gen. & Trans. Co-Op v. Pueblo of Laguna, 542 F.2d 1375, 1378-1379 (10th Cir. 1976), the legislative history of both Acts reflects Congress' belief that legislation was needed to allow valid rights-of-way to be acquired over Pueblo lands. It is inconceivable that Congress would have enacted two separate statutes to provide for rights-of-way over Pueblo

⁷ Those statutes, now codified at 25 U.S.C. §§311-328, had previously been determined not to apply to Pueblo lands by their terms. In Plains Electric Gen. & Trans. Co-Op v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976), the Court of Appeals held that the 1928 Act had impliedly repealed the 1926 Condemnation Act (which, under modern authority, would probably have been considered otherwise valid; Plains Electric, 542 F.2d at 1377, n.3).

lands in the four years following the Pueblo Lands Act, if it had already granted complete authority for such conveyances in 1924.

The language of the clause itself, moreover, negates Mountain Bell's argument. It is entirely phrased in the negative, unlike virtually every statute recognized as authority for conveyances of Indian lands, which typically use language stating that the Secretary is "authorized to grant a right-of-way," or similar phraseology. See, e.g., 25 U.S.C. §§311, 312, 319, 321, 323. As this Court said in Bryan v. Itasca County, 426 U.S. 373, 389-390 (1976), comparing a statute alleged to have impaired tribal rights with others that admittedly impaired those rights, "Congress knows well how to express its intent directly." There, the use of express language in the other statutes compelled the negative inference that the statute under consideration did

not have the effect being urged. Such an analysis applies fully here. Congress plainly knows how to bestow authority to grant rights-of-way. It did not do so in Section 17.

Further, in providing authority for grants of rights-of-way over Indian lands, Congress has always been careful to prescribe certain conditions for such grants, or at least to direct the Secretary to promulgate regulations setting conditions. See e.g., 25 U.S.C. §§311-325, 328. Section 17 is devoid of conditions or any directive to the Secretary to establish them, nor does it even limit the type of conveyance allowed. Under Mountain Bell's theory, a Pueblo may, even today, unconditionally sell the whole ranch if only the Secretary can be induced to go along with the transaction.⁸

⁸ In fact, as careful reading of the section

(continued on next page)

Congress has never before or since given such despotic power over Indian land to the Secretary, or such untrammelled discretion to any tribe, and there is no reason to believe it did so here.

It is true, as Mountain Bell notes, that the Non-Intercourse Act was not intended to forbid forever all conveyances of Indian land; its intent, rather, was to reserve to Congress complete and exclusive power to regulate such conveyances, and each of the transactions cited in the Petition at p. 14, n.4, was carried out pursuant to subsequently enacted statutory authority (or under provisions of treaties ratified by Congress). Likewise the

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reveals, Mountain Bell's contention would require the absurd conclusion that the section authorizes conveyances of Pueblo land, which is communally held, by "any Pueblo Indian living in a community of Pueblo Indians", with no more than the approval of the Secretary.

Pueblo Lands Act, and especially Section 17, reflects the expectation that conveyances of Pueblo lands would be allowed, but only pursuant to congressional enactment, and under the supervision of the Secretary. As to rights-of-way, the 1928 Act finally realized that expectation.

Mountain Bell's final point in support of its frankly anomalous interpretation of Section 17 is what it somewhat over enthusiastically characterizes as "an established construction" of the Act by the Department of the Interior over a period of 30 years, i.e., from 1926 to 1956. The record with respect to this "established construction" reveals that resort to Section 17 as authority for rights-of-way occurred mainly during the brief period of 1926-1928, before Congress had enacted lawful authority for such

grants.⁹

Thereafter, the hundreds of easements over Pueblo lands by the Bureau of Indian Affairs were routinely approved under lawful authority (i.e., the 1928 and later

⁹ Before 1926, rights-of-way were approved under the general right-of-way statutes, until those were determined to be inapplicable to the Pueblos. See n.7, supra.

Mountain Bell also cites an easement granted to the Bureau of Reclamation in 1956 for a canal. The documents prepared in support of this easement show that Reclamation desired that it be approved under Section 17 to avoid the strictures of Interior Department regulations promulgated under the proper authority, 25 U.S.C. §323, that at that time limited such grants to terms of 50 years. (Reclamation officials then prepared a resolution for the Pueblo's approval, stating that the Pueblo wished to grant the easement "in perpetuity".) This incident reveals the soundness of the decision of the courts below. If Section 17 could be viewed as an unlimited grant of authority to the Secretary or his delegates to approve any conveyances of Pueblo lands without qualification, then all of the carefully considered and drafted conditions imposed by Congress and the Department of the Interior on such grants under 25 U.S.C. §§311-321 and 25 C.F.R. Pt. 169 go out the window. Precisely such abuses gave rise to the interpretation of Section 17 Mountain Bell urges here; there is every reason now to see that they never recur, by letting stand the decisions below.

Acts), with only sporadic (and inexplicable) citation of Section 17. This hardly amounts to "established construction" of the section by Interior.¹⁰ It is also worth recalling that the use of Section 17 to approve easements before Congress passed the 1928 Act was mainly to benefit companies like Mountain Bell, that had constructed lines over Pueblo land unlawfully and suddenly found themselves being sued by the United States under the Pueblo Lands Act procedures. (See Section II, infra.)

Mountain Bell in any event has vastly overstated the significance to be attached to an administrative practice such as that it purports to discern in the record herein. As this Court explained in a recent decision, the rule of deference to

¹⁰ Or by anyone else. The record shows that in 1929, Mountain Bell itself applied for a second right-of-way across Santa Ana land. The easement was applied for and granted explicitly under the authority of the 1928 Act, not Section 17. R., Supp. Vol. I, 21-24.

an interpretation of a statute by the administrative agency charged with its enforcement "is more appropriately applicable in instances where ... an agency has rendered binding, consistent, official interpretations of its statute over a long period of time." Piper v. Chris-Craft Industries, Inc., 430 U.S. 1, 41 n. 27 (1977). And even then, such interpretation, while perhaps entitled to great weight, is "not controlling". United States v. National Ass'n of Securities Dealers, 422 U.S. 694, 719, (1975). And see United States v. Clark, 454 U.S. 555 (1982). Here, there are no binding, consistent or official interpretations of Section 17 by Interior officials, certainly nothing on a par with the S.E.C. rulings discussed in National Ass'n of Securities Dealers or the Civil Service Commission regulations cited in Clark. One regulation of the Interior Department, moreover, indicates that the

Department does not concur in Mountain Bell's interpretation of Section 17. That regulation, 25 C.F.R. §121.22, states that lands owned by an Indian tribe "may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary ...". This is of course fully in keeping with the view of Section 17 taken by the courts below, and its language compares favorably with that of Section 17 itself.

The history of Interior's erratic resort to Section 17, while totally insufficient to merit invocation of the administrative deference rule, does reveal the relatively trivial character of the instant dispute. Mountain Bell notes that about 60 easements were approved under Section 17, but close to half of those have been abandoned or renegotiated or have expired. No one will fail to obtain a right-of-way over Pueblo land as a result of the decisions below. Indeed,

the broad authority Congress enacted in 1928 for grants of rights-of-way over Pueblo lands was considerably expanded in 1948, by the enactment of 25 U.S.C. §323. At the very most, the decisions below may require renegotiation of 30 to 40 old easements, many of them quite small.¹¹ It is difficult to regard this issue as "an important question of federal law", Rule 17.2(c), R.S.Ct., even in the abstract, and it is manifestly of no consequence whatever to anyone but the handful of Pueblos and companies directly affected by these few remaining easements.

¹¹ The easement at issue in the instant case, for example, is a 2.9 mile strip only ten feet wide. Mountain Bell has already successfully renegotiated several easements originally approved under Section 17, and has undertaken settlement discussions on others.

Santa Ana understands that two other companies having such easements may seek to file briefs as amici curiae in support of Mountain Bell's petition. While they will undoubtedly predict dire consequences in the event the petition is denied, Santa Ana thinks it noteworthy that only these three companies feel unduly imposed upon by the decisions below.

II. Mountain Bell's Voluntary Dismissal From United States v. Brown Cannot Preclude Consideration Of The Validity Of The Right-Of-Way At Issue Herein.

This Court has, in two recent decisions, Arizona v. California, 460 U.S. 605 (1983), and Nevada v. United States, ___ U.S. ___, 103 S.Ct. 2906 (1983), expressed legitimate concern over efforts by Indian tribes to reopen final court decrees in which issues of land and water rights were fully litigated and decided. Mountain Bell seeks to hop on the coattails of those decisions, arguing that the concerns of finality and repose that guided the Court there have been disregarded in the instant case by the courts below. This is sheer overreaching.

The opinion in Arizona v. California arose from an effort by the United States and the five tribes it represented in an earlier stage of the litigation to reopen

the determination of the tribes' practicably irrigable acreage made by this Court more than 20 years previously. In rejecting the attempt, the Court recounted in some detail the complex and hotly contested litigation that resulted in the earlier decree, and emphasized that issues the parties "'have had a full and fair opportunity to litigate,'" 103 S.Ct. at 1392 (quoting Montana v. United States, 440 U.S. 147, 153-154 (1979)) should be conclusively settled once decided, especially in the sensitive areas of land titles and water rights.

Nevada v. United States was a similar case, another effort by the United States and a tribe to reopen a 40-year-old stream adjudication decree. Again, this Court held that the tribe was bound by the decree, noting that the United States had asserted the tribe's rights fully in the 30-year duration of the earlier proceedings, and reemphasizing the

importance of the finality of a judgment on the merits.

Suffice it to say that none of the considerations that underlie either Arizona v. California or Nevada v. United States is present here. In United States v. Brown there was no litigation of the issue presented here, no decision on the merits, no stipulation or agreement of the parties, no final judgment with respect to Mountain Bell. Indeed, the matter at issue here, the validity of Mountain Bell's Section 17 right-of-way, was not even raised by the pleadings in Brown, and could not have been.

Under the Pueblo Lands Act, the Pueblo Lands Board was to investigate the claims of private parties who had settled on Pueblo lands, to determine whether they met the criteria established by Congress that would entitle them to be given good title to the lands they occupied. Those who obtained favorable decisions from the

Board on their claims automatically got patents. Claimants as to whom the Board decided adversely were named as defendants in suits filed by the United States to quiet each Pueblo's title in the lands the Indian title to which the Board had found was not extinguished. Named defendants could still try to prove to the federal court that they met the criteria of the Act, namely, occupancy under color of title from 1902, or occupancy without color of title from 1889, plus payment of taxes for the requisite period.

United States v. Brown, No. 1814 (Equity) (D.N.M., decree entered May 31, 1929), was the suit brought under the Act on behalf of the Pueblo of Santa Ana. Mountain Bell was one of the many named defendants, inasmuch as the Board had determined that the company could not meet the criteria of the Act, having constructed its telephone line on Santa Ana land after 1902, and without color of

title. The suit was filed on November 27, 1927. Mountain Bell was served on December 14. (R.Supp.Vol. I, 49-55, 10.) It never answered the complaint, or even filed an appearance. Rather, it went directly to the Pueblo in February, 1928, and obtained its agreement to a right-of-way. (R.Supp. Vol. I, 42-47.) In March, 1929, the United States Attorney on the case, Mr. George A.H. Fraser, apparently having heard that Mountain Bell had obtained an agreement with the Pueblo, somewhat apologetically wrote Milton Smith, the company's in-house counsel, inquiring whether the company had in fact secured a right-of-way, and asking to be informed when it had been approved by the Secretary. He added that he would not take a default judgment against the company if he could be satisfied that they had obtained a right-of-way. Mr. Smith responded, saying that the company had already gotten the Pueblo's consent to an

easement, and it was being sent to Washington for approval. Mr. Smith wrote Mr. Fraser again telling him the agreement had been approved, and Fraser promptly prepared a motion and order for dismissal of Mountain Bell from the lawsuit. Judge Neblett signed the one-sentence order the day it was presented, and Mr. Fraser sent Mr. Smith a copy on the same day. (R.Supp. Vol. I, 4-9, 57.)

In attempting to elevate this voluntary dismissal of a non-appearing defendant to the status of a "consent decree", Mountain Bell characterizes the exchange of letters as "an express agreement", and "the parties' contractual agreement." Pet. at 22, 23. It is plain, however, that there was never any binding contract here, or any thought of creating one. Mr. Fraser did not bargain for Mountain Bell to obtain a right-of-way, he merely informed Mr. Smith that if Mountain Bell happened to have gotten one, he would

be glad to forego taking a default judgment. Mountain Bell proceeded to get the Pueblo's consent to an agreement and to obtain Secretarial approval (a procedure the company had followed with respect to several other Pueblos already; R., Supp. Vol. I, 6) before it ever heard from Mr. Fraser; the company clearly did not do it as "a condition of dismissal", or in "compliance" with any "agreement". Pet. at 22.

Even less can the perfunctory order of dismissal be viewed as a "consent decree". As the language of the order itself shows, Mountain Bell's "consent" was not sought, needed, or even mentioned in connection with the dismissal. The United States had an absolute right to dismiss Mountain Bell, even without a court order, and even over Mountain Bell's objection. Ex parte Skinner & Eddy Corp., 265 U.S. 86, 92-94 (1924); Jones v. S.E.C., 298 U.S. 1, 19, 20 (1936). That is all it did here. It

could have cited any reason for the dismissal, or none at all; it might, for example, merely have drafted the order to read, "for good cause shown," and the effect would have been precisely the same. And the decisions of this Court and the courts of appeal are tully consistent with the holding below on this point, that a voluntary dismissal before answer, not stated to be "with prejudice," is without prejudice. McGowan v. Columbia Rivers Packers Ass'n, 245 U.S. 352, 358 (1917). A.B. Dick Co. v. Marr., 197 F.2d 498, 502 (2d Cir. 1952); In re Piper Aircraft Distrib. Sys. Antitrust Litigation, 551 F.2d 213, 219 (8th Cir. 1977).

Mountain Bell attempts to make it appear that its dismissal from Brown was somehow in furtherance of the overall procedures and goals of the Pueblo Lands Act, and should be respected on that ground. On its face, however, the dismissal was obviously an evasion of the

Act's consequences. Mountain Bell could not prove good title under the terms of the Act. Had it been forced to defend its occupancy of Santa Ana land in Brown, it would undoubtedly have lost, as only satisfaction of one of the criteria of Section 4 of the Act would entitle a defendant to a decree in its favor. Instead, Mountain Bell resorted to the contrivance of a right-of-way under Section 17.¹² That right-of-way, even if valid, did not cure Mountain Bell's wrongful occupancy of Santa Ana land from 1907 to 1928; it was, at best, prospective only. The allegations of the complaint in Brown, thus, were not refuted by Mountain

¹² Presumably, under Mountain Bell's theory, any defendant in Brown who could not meet the Act's criteria could evade the Act by getting the Pueblo to sign a deed, and getting the sale approved by the Secretary under Section 17. It is hard to believe that Congress intended to create so vast a loophole in the carefully crafted procedures under the Act, especially after setting out a detailed procedure in Section 16 of the Act under which sales of isolated parcels might take place.

Bell's having gotten the right-of-way, Mountain Bell was merely excused from having to face the consequences. The dismissal order circumvented rather than furthered the goals of the Pueblo Lands Act.

The Act, contrary to Mountain Bell's assertions, was never intended to be a vehicle for resolution of "all Pueblo land claims." Pet. at 23. It was, rather, "an act of grace", Garcia v. United States, 43 F.2d 873, 878 (10th Cir. 1930), strictly for the benefit of those non-Indians whose occupancy of Pueblo lands would otherwise have been found to be unlawful. It was this discrete group of non-Indian claims that the Act hoped to resolve, and it placed the burden of making and proving those claims on the claimants, not the Pueblos. Those who, for whatever reasons, sought to avoid the operation of the Act did so at their peril.

Mountain Bell claims that the

decisions below conflict with various Seventh Circuit and Second Circuit opinions, but the cases cited, Pet. at 24-25, are utterly unlike this one. Each cited decision involved a prior case extensively litigated on its merits, then concluded by a consent decree clearly establishing the rights of the parties, and agreed to by both parties. In Brunswick Corp. v. Chrysler Corp., 408 F.2d 335 (7th Cir. 1969), the consent decree had stated at its conclusion that the action would be dismissed "without prejudice", but the court determined that that language was only intended to preserve the parties' right to enforce the consent decree, and the court thus accorded it res judicata effect in accordance with the prevailing rule. None of the other cases cited by Mountain Bell involved that issue; they merely address the point (irrelevant here) of the res judicata effect of consent decrees that

settle cases on their merits.

The only case cited by Mountain Bell that bears any resemblance to the instant one is the decision it tries to avoid, and that the court below relied on, National Life & Accident Insurance Co. v. Parkinson, 136 F.2d 506 (10th Cir. 1943). There, a receiver applied to the county commission to reduce the assessed value and the amount of unpaid back taxes on a piece of property. The commission declined, and the receiver appealed to the district court under the relevant statute. While the appeal was pending, the commission agreed to make the requested reductions, and the receiver paid the reduced taxes. The receiver asked the court to dismiss the appeal, which it did, in an order worded very much like the dismissal order in U.S. v. Brown, saying, "... it appearing to the court that" the taxes had been adjusted and paid as adjusted, etc. Subsequently, the Oklahoma

Supreme Court ruled that the statute under which the commission had reduced the tax assessment was invalid, and that all actions taken thereunder were void. In the subsequent litigation that reached the Tenth Circuit, the appellant (mortgagee of the property) contended that even if the action of the county commission were void, its recitation in the order of dismissal was nonetheless conclusive as to whether the taxes assessed against the property had been paid. The Tenth Circuit's reasoning there speaks directly to this case:

... we do not think that the order of the District Court merely consenting to the withdrawal of the appeal ... rises to the dignity of a consent judgment or dismissal on the merits ... [J]urisdiction was not exercised on any issue on the merits, and the order does not operate to adjudicate any issues raised by the appeal. Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked.

136 F.2d at 509.¹³ What occurred in Parkinson is precisely what occurred here: at a very early stage in the court proceeding, circumstances changed, vitiating the need to prosecute, as a result of which the plaintiff dismissed the matter voluntarily with the court's concurrence. In such a situation, the order of dismissal is no more an adjudication of the legal effect of the new circumstances that caused the matter to be dismissed than it is a decision on the merits of the original controversy.

There having been nothing remotely resembling a final order or decree on the merits of the question of validity of Mountain Bell's new right-of-way, and clearly no litigation of that issue, no doctrine of preclusion can operate to bar

¹³ Mountain Bell tries to distinguish this case by claiming that it "plainly rested" on the lack of jurisdiction of the district court, but that issue, if present at all, is in fact nowhere discussed in the opinion.

this action, nor are the important policies underlying the rules of preclusion implicated in any respect. Should Mountain Bell's argument prevail, however, and the innocuous order here be given preclusive effect, the ability of a plaintiff to dismiss a party voluntarily without losing the right to revive the action against that party at a later time would be severely compromised, and the portion of Rule 41, F.R.Civ.P., stating that a voluntary dismissal, unless otherwise stated, "is without prejudice," will have to be rewritten.¹⁴

¹⁴ Rule 41 has been described as being "declaratory of a long established practice in the courts". Home Owners Loan Corp., v. Huffman, 134 F.2d 314, 317 (8th Cir. 1943).

CONCLUSION

For the foregoing reasons, Respondent Pueblo of Santa Ana respectfully urges that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

Richard W. Hughes
(Counsel of Record)
Scott E. Borg
LUEBBEN, HUGHES & TOMITA
201 Broadway S.E.
Albuquerque, NM 87102
(505) 842-6123

Attorneys for Respondent

September 12, 1984

A P P E N D I X

Santa Fe, N.M.
February 27, 1926
c/o Pueblo Lands Board

United States as guardian of the
Pueblo of Jemez, v. Santa Fe
Northwestern Ry. Co.

The Attorney General,

Washington, D.C.

Sir:

This is one of the suits to quiet title following the report of the Pueblo Lands Board. It is at issue and could be tried at any time when a Federal Judge is available. There has recently occurred a new development, however.

This railroad was started as a private logging railroad, but has more or less developed until it is now about 40 miles long and has been recognized as a common carrier by the Interstate Commerce Commission. A further extension of 20 miles is being arranged, and it is locally hoped and expected that still further extensions will be made and that the road

will be a valuable agency in developing the state.

Its right-of-way crosses not only Jemez but three other Pueblos, and was obtained in each case under the 1899 Act: U.S. Compiled Statutes, Section 4181, et. seq. The Pueblo Lands Board concluded that this Act was not broad enough to cover lands owned in fee by the Pueblo Indians and reported that the title to the land occupied by the Railway remained unextinguished in the Indians, subject to the easement of right-of-way, if any valid easement had been actually acquired. I agreed with the Board in believing that the Act of 1899 did not cover in this case. For this reason, and under the express requirements of the Pueblo Lands Act, a suit to quiet title became inevitable. You will find a discussion, both of the facts and law, in my letters of November 4th and November 27, 1925, to you.

It now transpires that at the time the suit was filed, viz: about January 8, 1926, the White Pine Lumber Company, which is practically identical with the Railway Company, was negotiating a loan of over a million dollars to be secured by a bond issue covering properties, as I understand it, both of the Lumber Company and of the Railway Company, the proceeds to be used for further development work. The suit evidently came as a great surprise to the Railway Company, which had apparently not studied the Act of 1899 carefully and which, having fully complied with all the requirements of the Department of the Interior, believed its title to be sound. The bond houses in Chicago, which were preparing to underwrite the bond issue, immediately took cognizance of the situation, and after some correspondence a conference was had here yesterday, at their request. There were present, Governor H. J. Hagerman, who represents

the Secretary of the Interior on the Pueblo Lands Board; Mr. Cochrane, Special Attorney for the Pueblo Indians; Judge Hanna, of Albuquerque, who is attorney for some of the Indian Aid societies and, as well, for local companies desirous of obtaining rights of way for power lines across some of the Pueblos; Mr. Porter, Vice-President of the Railway Company; Judge Hawley, of Chicago, representing the bond houses; and myself. The results of a lengthy discussion may be briefly summarized thus:

1. The Railway and Bond house representatives could not offer any plausible defense to the suit. In other words, while they would not admit that the Act of 1899 was inapplicable, it was quite clear that they felt such to be the case.

2. It was the general sense of all present that while the Pueblos should be protected in every way, their peculiar status ought not to put them in a more

avored position than other Indians or than white men, so as to be able to prevent railways, telegraph and telephone and power lines, etc. from crossing their grants. It also seemed fairly clear that this Railway has been a benefit rather than a detriment to the Jemez pueblo, being of some value to the Indians for transportation, and affording employment to a number of them. As above stated, this enterprise is favorably regarded in New Mexico as an existing agency of development which promises to be increasingly valuable to the state.

3. It was therefore felt that the government should not interfere with the Railway or its projected loan further than duty absolutely required, and there was much discussion as to how the right-of-way could be legalized. One alternative is offered by Section 17 of the Pueblo Lands Act, reading:

"Sec. 17. No right, title, or

interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

This section presents one of the numerous puzzles offered by the Act. At first reading the two halves of the section seem contradictory; the first saying that no title to the Pueblo Lands shall be acquired except under subsequent legislation by Congress, and the second half saying, in effect, that conveyance by Pueblos, or individuals thereof, may be valid if approved by the Secretary of the Interior. We concluded, however, that the two halves might be harmonized by construing the first to mean that no title

could be adversely acquired except under subsequent acts of Congress, and the second to mean that the Pueblos might voluntarily convey, and that such conveyance would be good if approved by the Secretary. Like so many other feature [sic] of this Act, the foregoing construction cannot be considered certain, but seems reasonable.

Since the conference, defendant's representatives have announced a purpose of immediately approaching the Secretary of the Interior in an attempt to agree upon a form of deed acceptable to him, which they will then try to have executed by the Pueblo authorities, and returned to Washington for approval. If all this succeeds, the bonding houses will apparently be willing to make the proposed loan.

In any effort to procure a conveyance from the Pueblo, the Company will doubtless be met with a demand for

additional compensation. I have heretofore expressed a doubt whether the damages already paid are adequate, and if the general scheme is approved, the question of increased compensation will be looked into by the Special Attorney for the Pueblo Indians. You will note that Section 17 does not expressly say that Pueblo conveyances shall hereafter be valid if approved by the Secretary, but merely that they shall not be valid unless so approved. Theoretically, and in fact, the Pueblo Indians are incompetent to manage their own affairs, and I think it unfortunate if the Pueblo corporations -- and still more the individual Indians -- are now authorized to convey, even subject to an approval, which must usually be based on the recommendation of some local official who may or may not be fully informed and disinterested. However, in the present instance the railway is already constructed and cannot well be got

rid of; it has paid a considerable sum (nearly \$3,000 to Jemez Pueblo) as damages; it appears to be a public benefit; and if it deems this method of curing its title sufficient, and can bring it about, I think the general good would be served by acquiescing rather than by urging the doubts suggested by Sec. 17.

4. In the long run, I believe that the only certain way of rectifying the general situation is by Act of Congress. It is fair that the Pueblos should be subject to the acquisition of rights of way for public utilities of all sorts, just as other Indians are, on payment of just compensation. It was suggested at the conference that it would not be difficult to frame an Act making the provisions of U.S. Compiled Statutes, Section 4181, et. seq., applicable to the Pueblos; but defendant has apparently decided to try the other course first.

5. One result of all the foregoing is

App.10

that the Railway Company would like the suit to lie dormant until they can make an attempt to validate their title by one or the other of the above methods. If either should succeed, the controversy would become moot and the suit could be dismissed. They are naturally reluctant to run the risk of a judgment declaring in effect that they are trespassers, and call attention to their good faith and to the prima facie validity of the permit of the Secretary under which they acted. They also promise immediate action in the way above indicated, and obviously they cannot hope otherwise to obtain their loan.

I therefore ask authority to suspend proceedings in this suit for a reasonable time, until we see what they can accomplish.

I understand that Governor Hagerman and Mr. Cochrane agree with my views as to the desirability of assisting rather than thwarting the railway project, and that

App.11

the former will so report to the Department of the Interior.

Respectfully,

s/GEO. A. H. FRASER

Special Assistant to
the Attorney General

WILSON AND PERRY
Attorneys at Law
Salmon Building
Santa Fe, N.M.

December 18, 1923.

Hon. Chas. H. Burke,
Commissioner of Indian Affairs,
Washington, D. C.

Dear Mr. Commissioner:

Referring to your letter of the 12th inst., I would like to call your attention to the fact that Section 17 of the Bill is, we think the shortest way to prevent present conditions from recurring or existing again. Please look that section over and see if you do not agree with us upon that point. This section is intended to cover the same ground as Section 2116 of the Revised Statutes but it is changed so as to accord with the conditions of the Pueblo Indians.

Section 18 of the proposed legislation covers the same ground as Section 2118 and

Section 2117 of the Revised Statutes except that the penalties in each instance have been doubled.

Section 19 is intended to cover the same ground as Section 2145 of the Revised Statutes excluding certain provisions applicable to Indian country which would not be appropriate for the government of Pueblo land grants by your office.

These three sections are therefore not new but have precedent in the Revised Statutes mentioned applicable to other Indians, the last one mentioned putting into effect a criminal code as is in effect in other Indian reservations with the exception of the sections noted.

As to the rest of the new provisions, they are for the most part for the purpose of making of the Commission created by the bill, a body capable of finding facts upon which future action can be taken whether by Congress or by the Secretary of the Interior.

App.14

. . . [Here follows a lengthy
discussion of a brief Wilson had received
on an unrelated issue.] . . .

Sincerely yours,

/s/

Francis F. Wilson

SEP 13 1984

No. 84-262

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,
v. *Petitioner,*
PUEBLO OF SANTA ANA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

**MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*
AND BRIEF *AMICUS CURIAE* OF THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COMPANY**

ROBERT R. BATESON
General Attorney
SANTA FE INDUSTRIES, INC.
224 South Michigan Avenue
Chicago, Illinois 60604
(312) 347-2265

JOHN R. COONEY
(Counsel of Record)

LYNN H. SLADE

JOHN S. THAL

WALTER E. STERN III

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

Post Office Box 2168

500 Fourth Street, N.W.

Suite 1000

Albuquerque, New Mexico 87102

(505) 848-1800

*Attorneys for The Atchison, Topeka
and Santa Fe Railway Company*

IN THE
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No. 84-262

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,
v. *Petitioner,*
PUEBLO OF SANTA ANA,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit**

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Atchison, Topeka and Santa Fe Railway Company ("AT&SF") hereby respectfully moves for leave to file the enclosed Brief *Amicus Curiae* in support of the Petition for Certiorari in this case. The consent of the attorney for the Petitioner has been obtained. The consent of the attorney for the Respondent was requested but refused. As grounds for this Motion, AT&SF states that it has a substantial interest in the case because:

1. AT&SF operates an interstate railway system subject to the jurisdiction of the Interstate Commerce Commission which provides interstate freight and passenger rail service over approximately 12,000 miles of track in twelve states;

2. In New Mexico, AT&SF's rail system crosses the lands of seven of the New Mexico Pueblos;

3. AT&SF was granted rights-of-way across each of the pertinent Pueblos prior to the enactment of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636;

4. Following enactment of the Pueblo Lands Act, each Pueblo granted to AT&SF new rights-of-way and each new right-of-way was approved by the Secretary of the Interior expressly acting pursuant to § 17 of the Pueblo Lands Act, the statute construed by the decision below;

5. Like the Petitioner, AT&SF was named by the United States in quiet title suits filed in behalf of each Pueblo pursuant to §§ 3 and 4 of the Pueblo Lands Act;

6. Upon AT&SF's obtaining the voluntary grant of new rights-of-way across the lands of the Pueblos and upon the approval of the rights-of-way by the Secretary of the Interior, the United States agreed to the entry of orders of dismissal, dismissing AT&SF from the quiet title suits;

7. The orders of dismissal entered by the federal district court in the quiet title suits, similar to that entered as to the Petitioner, stated that AT&SF had obtained valid rights-of-way pursuant to § 17 of the Pueblo Lands Act;

8. Like the Petitioner, AT&SF was unaware of any contention that its rights-of-way were invalid until the District Court entered its decision in this suit. Since that time, AT&SF has been sued by the Pueblo de Acoma (United States District Court for the District of New Mexico, No. CV-82-1550) and the Pueblo of Isleta (No. CV-82-1537). In both suits the Pueblos rely upon the District Court's opinion in the present case.

9. If the Tenth Circuit decision stands, it may significantly impair AT&SF's ability to provide freight and passenger rail service across New Mexico; thus the legal issues raised in the Petition and discussed in the enclosed Brief *Amicus Curiae* could have a direct and immediate bearing on the ability of AT&SF to continue operation of its interstate railway system across New Mexico.

10. For these reasons, this Motion for Leave to file a Brief *Amicus Curiae* should be granted.

Respectfully submitted,

ROBERT R. BATESON
General Attorney
SANTA FE INDUSTRIES, INC.
224 South Michigan Avenue
Chicago, Illinois 60604
(312) 347-2265

JOHN R. COONEY
(Counsel of Record)

LYNN H. SLADE

JOHN S. THAL

WALTER E. STERN III

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

Post Office Box 2168

500 Fourth Street, N.W.

Suite 1000

Albuquerque, New Mexico 87102

(505) 848-1800

*Attorneys for The Atchison, Topeka
and Santa Fe Railway Company*

QUESTIONS PRESENTED

1. Whether principles of deference to contemporaneous administrative interpretation of statutory authority require construction of § 17 of the Pueblo Lands Act to have authorized Pueblos to grant rights-of-way approved by the Secretary of the Interior?

2. Whether the administrative interpretation that § 17 of the Pueblo Lands Act authorized a Pueblo to grant rights-of-way conditioned upon approval of the Secretary of the Interior offends any principle of the Indian Nonintercourse Acts?

3. Whether Congress' provision for comparable actions to be brought by the United States precludes implication of a private right of action for tribes or Pueblos? And,

4. Whether the consensual dismissal by the United States on behalf of an Indian Pueblo of a Pueblo Lands Act quiet title suit is *res judicata* of a subsequent suit filed by the Pueblo on the same claim 50 years later?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
INTEREST OF <i>AMICUS CURIAE</i>	2
STATUTORY PROVISIONS INVOLVED	4
REASONS FOR GRANTING THE WRIT	4
I. The Decision Below, Invalidating All Rights-of-Way Granted Under the Pueblo Lands Act, Decides Important Questions Concerning That Act in a Manner That Conflicts With the Decisions of This Court	4
A. The Decision Below Conflicts With Decisions of This Court Requiring Consideration of All Factors Bearing on Congressional Intent..	5
B. The Decision Below Conflicts With Decisions of This Court Requiring Deference to Administrative Interpretation	9
II. The Decision Below Conflicts With This Court's Historic Interpretation of the Indian Nonintercourse Acts	11
III. The Decision Below Conflict With Decisions of This Court Governing the Implication of Private Rights of Action	16
IV. The Decision Below Conflicts With the Decision of This Court in <i>Nevada v. United States</i> , 103 S.Ct. 2906 (1983)	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:	Page
<i>Alonzo v. United States</i> , 249 F.2d 189 (10th Cir. 1957)	15
<i>Boy's Markets, Inc. v. Retail Clerks Union, Local 770</i> , 398 U.S. 235 (1970)	8
<i>Chemehuevi Tribe of Indians v. F.P.C.</i> , 420 U.S. 395 (1975)	6, 10
<i>Chouteau v. Molony</i> , 57 U.S. (16 How.) 203 (1853)	15
<i>Escondido Mutual Water Co. v. La Jolla Band of Mission Indians</i> , 104 S.Ct. 2105 (1984)	8
<i>Holden v. Joy</i> , 84 U.S. (17 Wall.) 211 (1872)	13
<i>Johnson v. McIntosh</i> , 21 U.S. (8 Wheat.) 543 (1823)	13
<i>Jones v. Meehan</i> , 175 U.S. 1 (1899)	12, 13
<i>Lomax v. Pickering</i> , 173 U.S. 26 (1899)	15
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 554 (1903)	5
<i>Mitchel v. United States</i> , 34 U.S. (9 Pet.) 711 (1835)	13
<i>Nevada v. United States</i> , 103 S.Ct. 2906 (1983)	16, 17
<i>Olipphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	15
<i>Oneida Indian Nation of New York v. Oneida County</i> , 719 F.2d 525 (2nd Cir. 1983), cert. granted, 104 S.Ct. 1590 (1984)	16
<i>Pickering v. Lomax</i> , 145 U.S. 310 (1892)	14
<i>Plains Electric Generation & Transmission Co-op., Inc. v. Pueblo of Laguna</i> , 542 F.2d 1375 (10th Cir. 1976)	5, 9, 17-18
<i>Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers</i> , 367 U.S. 396 (1961)	10
<i>Pueblo of Isleta v. Universal Constructors, Inc.</i> , 570 F.2d 300 (10th Cir. 1978)	15
<i>Rice v. Rehner</i> , 193 S.Ct. 329 (1983)	5
<i>Smith v. Stevens</i> , 77 U.S. (10 Wall.) 321 (1870)	15
<i>Southern Pacific Railroad Co. v. United States</i> , 168 U.S. 1 (1897)	17
<i>Southern Pacific Transportation Co. v. Watt</i> , 700 F.2d 550 (9th Cir.), cert. denied, 104 S.Ct. 393 (1983)	8

TABLE OF AUTHORITIES—Continued

	Page
<i>Tidewater Oil Co. v. United States</i> , 409 U.S. 151 (1972)	8
<i>Transamerica Mortgage Advisors, Inc. v. Lewis</i> , 444 U.S. 11 (1979)	16
<i>Udall v. Tollman</i> , 380 U.S. 1 (1965)	9
<i>United States v. Candelaria</i> , 271 U.S. 432 (1926) ..	13
<i>United States v. ITT Continental Baking Co.</i> , 420 U.S. 223 (1975)	17
<i>United States v. Pico</i> , 72 U.S. (5 Wall.) 536 (1866)	15
<i>United States v. Vogel Fertilizer Co.</i> , 455 U.S. 16 (1982)	10
FEDERAL STATUTES AND REGULATIONS:	
Act of May 10, 1926, 44 Stat. 498	5, 9, 17
Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177 (1982)	7, 12
Pueblo Lands Act of June 7, 1924, 43 Stat. 636	passim
Revised Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (Supp. 1984)	3
Act of February 5, 1948, c.45, § 1, 62 Stat. 17, 25 U.S.C. §§ 323-328 (1982)	9, 11
25 C.F.R. § 169.3(a) (1984)	3, 9
25 C.F.R. § 169.19 (1984)	3
25 C.F.R. § 169.23(a) (1984)	3
LEGISLATIVE HISTORY:	
S. Rep. No. 492, 68th Cong., 1st Sess. (1924)	8, 10
S. Rep. No. 823, 80th Cong. 2d Sess. 3-4, reprinted in 1948 U.S. Code Cong. & Ad. News 1033, 1036 ..	11
Hearings on S. 3865 and S. 4223 Before Subcomm. of Sen. Comm. on Public Lands and Surveys, 67th Cong., 4th Sess. 230-35 (1923)	6
OTHER AUTHORITIES:	
F. Cohen, <i>Federal Indian Law</i> (Univ. of N.M. reprint, 1942 ed.)	13, 16

TABLE OF AUTHORITIES—Continued

	Page
James, <i>Consent Judgments as Collateral Estoppel</i> , 108 U.Pa.Rev. 173 (1959)	17
L. Kelly, <i>The Assault on Assimilation, John Collier and the Origins of Indian Policy Reform</i> (1st ed. 1983)	11
<i>The Legal Status of the Indian Pueblos of New Mexico and Arizona</i> , 57 I.D. 36 (1939)	15

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-262

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit**

**BRIEF AMICUS CURIAE OF THE ATCHISON,
TOPEKA AND SANTA FE RAILWAY COMPANY**

The *amicus curiae*, The Atchison, Topeka and Santa Fe Railway Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on May 14, 1984.

OPINION BELOW AND JURISDICTION

The opinion of the Court of Appeals and the grounds underlying this Court's jurisdiction are adequately described in the Petition for Writ of Certiorari of the Petitioner, Mountain States Telephone and Telegraph Company ("Mountain Bell"), filed August 13, 1984.

INTEREST OF THE *AMICUS CURIAE*

The Atchison, Topeka and Santa Fe Railway Company ("AT&SF") is a rail carrier operating an interstate railway system subject to the jurisdiction of the Interstate Commerce Commission under the Revised Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (Supp. 1984). AT&SF's railway system provides interstate freight and passenger rail service over approximately 12,000 miles of track in 12 states. Across New Mexico, AT&SF's rail service is made possible by rights-of-way across lands of seven of the New Mexico Pueblos, whose lands occupy substantial portions of central New Mexico: the Pueblo of Santa Ana, the Pueblo of San Felipe, the Pueblo of Sandia, the Pueblo of Isleta, the Pueblo de Santo Domingo, the Pueblo de Acoma, and the Pueblo of Laguna. The decision below, by threatening invalidation of portions of AT&SF's rights-of-way across Pueblo lands, obtained by virtue of grants pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 ("§ 17"), poses a significant threat to the continuity of AT&SF's service. Consequently, the decision threatens one of the primary goals of the Revised Interstate Commerce Act: to "ensure the development and continuation of a sound rail transportation system . . ." 49 U.S.C. § 10101a (Supp. 1984). Indeed, the Pueblos of Isleta and Acoma have already sued to eject AT&SF from their lands based on the decision below.

Before 1924, AT&SF had obtained rights-of-way across each of the pertinent Pueblos' lands. However, following enactment of the Pueblo Lands Act of 1924, AT&SF obtained the voluntary agreement of each Pueblo to new rights-of-way, and each new right-of-way was approved by the Secretary of the Interior expressly acting pursuant to § 17 of the Pueblo Lands Act. As to the Respondent, Pueblo of Santa Ana ("the Pueblo"), AT&SF was granted, upon the payment of additional compensation, a § 17 easement from the Pueblo on October 5, 1928.

It is further significant to an understanding of the historical context of this case that AT&SF, like Mountain Bell, and the United States, acting on behalf of each Pueblo, agreed to consent decrees in quiet title suits filed by the United States pursuant to the Pueblo Lands Act. The statutory purpose of such suits was to quiet title to the Pueblo lands, Pueblo title to which was asserted "not to have been extinguished." Pueblo Lands Act § 3, App. 23. AT&SF's position is further markedly similar to that of Mountain Bell in that the orders of dismissal as to AT&SF recited that it had obtained valid rights-of-way pursuant to § 17 of the Pueblo Lands Act. AT&SF was unaware of any contention that its rights-of-way were invalid until the District Court entered its decision in this suit.

If the decision below were to stand, it could significantly impair AT&SF's ability to economically provide rail service.¹ Present regulations of the Department of the Interior require the consent of an Indian tribe to the granting or renewal of any right-of-way across tribal lands. See 25 C.F.R. §§ 169.3(a), 169.19, 169.23(a) (1984); see also *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 393 (1983). Consequently, it cannot be ascertained that AT&SF would be allowed to maintain its railway facilities in their existing locations on Pueblo lands. The practical and economic effect on AT&SF of being required to re-route its tracks, assuming such were feasi-

¹ The decision below could result in a conflict with the statutory mandate of the Interstate Commerce Act. Pursuant to that Act, AT&SF may abandon a rail line or discontinue service only upon a finding by the Interstate Commerce Commission that such abandonment is required by "present or future public convenience and necessity . . ." 49 U.S.C. § 10903 (Supp. 1984). If the decision below stands and AT&SF is denied possession of the lands of any Pueblo, AT&SF could be prevented from continuing its present service.

ble, are staggering:² AT&SF would be required to plan for and acquire scores of miles of new rights-of-way despite subsequent development of adjoining areas that would result in greatly increased right-of-way and construction cost. AT&SF would further be prejudiced by having to construct over less desirable terrain and over a longer route (the existing location of AT&SF's lines provides the shortest route subject to the engineering constraints affecting rail transportation) and by the attendant increased cost and disruption of service.

STATUTORY PROVISIONS INVOLVED

Pueblo Lands Act of June 24, 1924, § 17: The full text of the Pueblo Lands Act of 1924, 43 Stat. 636, is reproduced as Appendix C. [App. 22-33].

Indian Trade and Intercourse Act ("Nonintercourse") of 1834, Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177 (1982). The full text of the Indian Nonintercourse Act of 1834 is reproduced as Appendix D. [App. 34].

REASONS FOR GRANTING THE WRIT

I. The Decision Below, Invalidating All Rights-of-Way Granted Under the Pueblo Lands Act, Decides Important Questions Concerning That Act in a Manner That Conflicts With the Decisions of This Court.

The decision below constitutes a significant misapplication of principles of statutory construction, administrative law, and Indian law decided by this Court. The Court of Appeals' opinion would invalidate all rights-of-way granted pursuant to an Act of Congress without any pretense that the rejected practice prejudiced the sub-

² It must be assumed that such cost and dislocation of service would be known to Pueblos. Consequently, if the Court of Appeals' decision should stand, it must be anticipated that negotiations for renewal will center upon the economic consequences to AT&SF of a Pueblo's flatly withholding consent to a right-of-way and, thereby, forcing a possible relocation of facilities, assuming relocation is feasible.

stantive interests of any Pueblo.³ Based upon the erroneous conclusion that the statute is unambiguous, the Tenth Circuit opinion discards a contemporaneous administrative construction of the statute long relied upon by scores of grantees. Significantly, neither of the opinions below cites any case invalidating a conveyance voluntarily granted by a tribe or Pueblo and approved by the Secretary. Consequently, the opinions below make new and potentially far-reaching law: that a statute specifying a form of federal approval as a condition to the validity of a tribal conveyance does not supply any needed congressional authorization for a conveyance so approved. This Court's Indian lands decisions refute that proposition. Certiorari should be granted to correct this fundamental divergence from the decisions of this Court.

A. The Decision Below Conflicts with Decisions of This Court Requiring Consideration of All Factors Bearing on Congressional Intent.

The fundamental flaw in the Tenth Circuit opinion is its conclusion that § 17 is unambiguous with respect to the validity of Pueblo conveyances and, consequently, it was not required to consider other indications of congressional intent.⁴ Judge Breitenstein's opinion for the Tenth Circuit held that § 17 unambiguously imposed two requirements on the validity of Pueblo conveyances:

³ Any assertion of prejudice would, in any event, be untenable because, at the time Mountain Bell's (and AT&SF's) rights-of-way were granted, Congress had also provided for condemnation of Pueblo lands. Act of May 10, 1926, 44 Stat. 496; see *Plains Electric Generation & Transmission Co-op., Inc. v. Pueblo of Laguna*, 542 F.2d 1375 (10th Cir. 1976).

⁴ The Tenth Circuit suggests that the Pueblo's status as an Indian tribe would have compelled a conclusion in the Pueblo's favor if Section 17 were ambiguous. [App. 8-9]. The principle cited neither requires that all ambiguities be resolved in favor of Indians, *Rice v. Rehner*, 103 S.Ct. 3291, 3302 (1983), nor relieves a court of the duty to address all matters that reflect congressional intent, which is controlling as to the Pueblo's property rights. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

the subsequent congressional enactment of specific statutory authority for the conveyance *and* the approval of any conveyance so authorized by the Secretary of the Interior. The court, therefore, determined it was not required to consider an undisputed administrative interpretation that contradicted its views. [App. 9] It further neglected to consider this Court's Indian Nonintercourse Act rulings, which plainly do not contemplate any such dual requirement. The Tenth Circuit erred in disregarding the rule that, even where a statute assertedly is unambiguous, its language must be construed in light of its purpose and the construction placed upon it by the agency charged with its administration. *Chemehuevi Tribe of Indians v. F.P.C.*, 420 U.S. 395, 404, 409 (1975).

Section 17 is ambiguous because its two main clauses employ different terms to describe the subject of their provisions. Because the Pueblo Lands Act addressed two discrete problems concerning Pueblo lands, susceptible to different solutions, the Tenth Circuit erred in rejecting the administrative construction that Congress did not intend the first clause to impose additional conditions upon the voluntary conveyances that are the subject of the second clause. The historical context of the Pueblo Lands Act readily supplies independent purposes to the two provisions. The Act addressed two principal concerns respecting Pueblo lands, both arising from prior uncertainty as to the existence of federal restraints on alienation of Pueblo lands. First, Congress desired to prevent the involuntary loss of Pueblo lands which previously had resulted from state law condemnations, effects of judgments, the non-payment of taxes, state law adverse possession, and the like. See Hearings on S. 3865 and S. 4223 Before Subcommittee of the Committee on Public Lands and Surveys, U.S. Senate, 67 Cong., 4th Sess. 230-35 (1923). Second, Congress intended to resolve questions as to the validity of conveyances by Pueblos and their members and to make clear that the

Indian Nonintercourse Act of 1834, 25 U.S.C. § 177 (1982), was applicable to Pueblos. [See Petition, 16, n. 6-8]

The two clauses of § 17 were intended to address independently these two problems respecting Pueblos lands. Section 17 provides:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the lands of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

Pueblo Lands Act, § 17. The first major clause addresses the main congressional concern arising from prior involuntary loss of lands under state law; the second major clause imposes an express restraint upon alienation, thus impliedly authorizing Pueblos to convey upon satisfaction of the statutory condition of Secretarial approval. Section 17 may not be considered unambiguously to have imposed both conditions upon the conveyances referred to only in the second clause [see Petition, 20].

The Tenth Circuit's only explanation for its conclusion that the Section is unambiguous, the observation that "[t]he two clauses of § 17 . . . are joined by the conjunctive 'and'" [App. 8], does not harmonize its provisions. A provision prohibiting the acquisition or initiation of rights in Pueblo lands under the laws of the State of New Mexico or otherwise, on its face, addresses matters different from federally approved sales, grants, leases or

conveyances. The statute is, at least, ambiguous as to whether the condition of the first clause is imposed on the conveyance of the second. Certainly, the statute does not contain a plain, unequivocal command precluding the administrative interpretation. As this Court stated in *Boy's Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 250 (1970),

Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.

See also *Tidewater Oil Company v. United States*, 409 U.S. 151, 159 (1972). The Tenth Circuit's myopic determination not to probe the administrative and historical record to ascertain whether Congress intended the construction applied by the agency was error.

The Court of Appeals' interpretation of § 17 as prohibiting, rather than authorizing, conveyances by a Pueblo with the consent of the Secretary further conflicts with the statutory purpose of the Act to comprehensively settle the status of Pueblo lands. See S. Rep. No. 498, 68th Cong. 1st Sess. 5 (1924). Given the construction applied below, the Act would have rendered Pueblo lands, unlike the lands of all other tribes, unavailable for even consensual use by non-Indians, even for publicly needed rights-of-way, by any procedure. Nothing in the legislative history indicates such an intention. The decision below thus erroneously construes the Section in a manner inconsistent with a central purpose of the Pueblo Lands Act: to provide a workable scheme for the administration of Pueblo lands. See *Escondido Mutual Water Company v. La Jolla Band of Mission Indians*, 104 S.Ct. 2105 (1984).

The first clause of § 17 should be given its obviously intended effect, to make clear the inapplicability of state

law and to require that existing federal statutes authorizing conveyances of interests in tribal lands, many of which did not require tribal consent, be made specifically applicable to Pueblos.⁵ Section 17's second clause can then be understood as providing statutory authority for any needed conveyance duly consented to by a Pueblo, until Congress should thereafter provide by specifically legislating that other Acts should apply to Pueblo lands.⁶ This was plainly the agency's view. Because the administrative interpretation is a reasonable one, the Court of Appeals erred in substituting its views for those of the agency. *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

B. The Decision Below Conflicts With Decision of This Court Requiring Deference to Administrative Interpretation.

The most significant canon of construction prescribed by this Court and disregarded by the decision below recognizes that

⁵ As Mountain Bell has demonstrated, this interpretation of the first clause is reflected in the legislative history of subsequent enactments. When the consent of the Jemez Pueblo was denied for a railroad right-of-way, Congress was requested to, and did, further legislate to provide condemnation of Pueblo lands. Act of May 10, 1926, 44 Stat. 498. Congress subsequently extended to Pueblo lands other specific rights-of-way Acts authorizing the Secretary to grant rights-of-way without tribal consent. Act of April 21, 1928, 45 Stat. 422, 25 U.S.C. § 322 (1982). It appears that the BIA considered these Acts to provide authority for rights-of-way when Section 17 was unavailable because a Pueblo would not consent. [See Petition, 19].

⁶ It should be noted that the decision below will not affect future grants of rights-of-way. Present regulations of the BIA purportedly authorized by the General Purpose Rights-of-Way Act, of February 5, 1948, c.45, § 1, 62 Stat. 17, 25 U.S.C. §§ 323-328 (1982), prescribe what the BIA considers to be generally applicable procedures for present and future grants of rights-of-way. 25 C.F.R. §§ 169.1-169.28 (1984); see *Plains Electric Generation & Transmission Co-op., Inc. v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir. 1982).

a longstanding, uniform construction by the agency charged with the administration of the [Act], particularly when it involves a contemporaneous construction of the Act by the officials charged with the responsibility of setting its machinery in motion is entitled to great respect.

Chemehuevi Tribe of Indians v. F.P.C., 420 U.S. at 410-11.

The Court of Appeals did not dispute that the Secretary's approval of at least 60 rights-of-way spanning a period of nearly 30 years constituted both a contemporaneous interpretation and a longstanding one; rather, it concluded that "courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate . . ." [App. 9]. The Tenth Circuit neglected, however, to recognize that, especially where much time has elapsed, agency officials implementing statutory commands are held to have a better view of the "statutory mandate" than a reviewing court many years later—especially where, as here, the agency officials participated in the legislative process. See *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 408 (1961); see also *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982).

As applied to the facts of this case and to the administrative practice invalidated, this rule is particularly compelling. Interior Department officials testified before Congress in the legislative hearings on the Pueblo Lands Act. S. Rep. No. 492, 68th Cong. 1st Sess. 154-55 (1924). Beginning in April, 1926, the BIA, Southern Pueblos Agency, began approving rights-of-way pursuant to § 17. [R. Vol. II, 2, 6] Sixty such rights-of-way were granted, each voluntarily granted by the affected Pueblo, and each approved at the level of Secretary or Assistant Secretary

of the Interior.⁷ [R. Vol. II, 7] Significantly, the Pueblos, who participated vigorously in the formation of the Pueblo Lands Act, see L. Kelly, *The Assault on Assimilation, John Collier and the Origins of Indian Policy Reform*, 255-93 (1st ed. 1983), affirmed the administrative construction by joining in each conveyance. The decision below significantly deviates from this Court's opinions by holding the contemporaneous administrative interpretation not to be pertinent to its construction of the Act.

II. The Decision Below Conflicts With This Court's Historic Interpretation of the Indian Nonintercourse Acts.

The decisions below are further flawed by their premise that the Indian Nonintercourse Act of 1834 requires some greater expression of Congressional intent to validate voluntary tribal conveyances than the express provision that such conveyances shall be invalid unless approved by the Secretary. Contrary to the premise of the lower court, this Court consistently has recognized the validity of conveyances pursuant to comparable provisions, and its cases affirm a tribal power of alienation subject to the federal supervision designated in statutory restraints on alienation.

⁷ The Interior Department also considered it had general authority to grant rights-of-way across lands of any tribe pursuant to identical procedures. In introducing legislation that became the 1948 General Purpose Rights-of-Way Act, 25 U.S.C. §§ 323-328 (1982), Under Secretary of the Interior, Oscar L. Chapman, wrote to Arthur H. Vandenberg, President *pro tempore* of the Senate,

When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior.

S. Rep. No. 823, 80th Cong., 2d Sess. 3-4 (1948), reprinted in 1948 U.S. Code Cong. & Ad. News 1033, 1036. Thus, the administrative practice was comparable to that applicable other tribes.

Section 17's second clause provides:

no sale, grant, lease of any character or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community . . . shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

The District Court concluded that this provision did not comport with prerequisites of the Nonintercourse Act of 1834, because it "was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands." [App. 39] The Court of Appeals affirmed the trial court's view that "§ 17 was intended as an extension to the Pueblos of the Nonintercourse Act, in prohibiting alienation of pueblo lands except as Congress may provide in the future and as approved by the Secretary." [App. 5] Both courts then concluded that Congress' intention to apply the Nonintercourse Acts to Pueblos by the Pueblo Lands Act supported the holding that § 17 was not intended to authorize voluntary conveyances approved by the Secretary. This Court's cases refute that premise and the conclusion derived from it.

The attempt of the Court of Appeals to engraft upon this Court's Nonintercourse Act rulings a requirement that Congress affirmatively authorize each conveyance or class of conveyances is unsupportable. As this Court concluded upon review of the Nonintercourse Acts,

It is well settled that a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States.

Jones v. Meehan, 175 U.S. 1, 10 (1899). This rule is founded in the notion that federal, and not necessarily congressional, supervision of tribal conveyances is contemplated by the Nonintercourse Acts. The Nonintercourse Act of 1834 confirms this proposition: the treaties and conventions that it provided could authorize tribes to

convey their lands were not Acts of Congress, but agreements made by a representative of the President with the advice and consent of the Senate. *See* F. Cohen, *Federal Indian Law* 39 (Univ. of N.M. Reprint, 1942 ed.)

The historical underpinnings of federal restraints on alienation are well established. Federal restraints are grounded in the principle that came to be acknowledged by the maritime powers during the period of discovery and colonization of the New World, *see Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573 (1823), that the "nation making the discovery [obtained] the sole right of acquiring the soil and of making settlements of it. . . . [Discovery] gave the exclusive right to purchase, but did not found that right on a denial of the right of the [tribal] possessor to sell." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872). Chief Justice Marshall's decision in *Mitchell v. United States*, 34 U.S. (9 Pet.) 711 (1835), surveyed the legal history of tribes' powers with respect to their lands, both in the English and Spanish colonies. 34 U.S. (9 Pet.) at 736-760. In rejecting the contention that a conveyance of Indian land was invalid because approved only by a local Spanish governor, and not by direct royal confirmation, Justice Marshall concluded that:

The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the king.

Id. at 759-60. The Nonintercourse Acts did not alter these colonial rules; those Acts "recognized and enforced" them. *Jones v. Meehan*, 175 U.S. at 9.

This Court's description of Nonintercourse Act requirements for Pueblo conveyances in *United States v. Candelaria*, 271 U.S. 432 (1926), reinforces that the Nonintercourse Acts contemplated the validity of tribal con-

veyances made subject to federal approval. *Candelaria* recognized that, under Spanish law, Pueblos "could alienate their lands only under governmental supervision...", and that Mexican law imposed similar restraints. 271 U.S. at 442. Justice Van Devanter's decision for this Court held Nonintercourse Act requirements to be comparable:

Thus it appears that Congress in imposing a restriction on the alienation of these lands as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such lands.

271 U.S. at 442. All § 17 rights-of-way having been approved by the Secretary or Assistant Secretary of the Interior, the cases of this Court refute the assertion that historic interpretation of the Nonintercourse Act requires a greater measure of federal supervision or a more specific authorization than that provided by § 17. The almost verbatim incorporation of the Nonintercourse Act of 1834 in the second clause of § 17 strongly supports that Congress intended its provisions to reflect this historic construction.

The Court consistently has recognized that statutes affirmatively imposing a restraint upon alienation give rise to valid title upon satisfaction of the condition stated. In *Pickering v. Lomax*, 145 U.S. 310 (1892), this Court held valid a deed granted pursuant to a treaty provision nearly identical to the second clause of § 17:

The tracts of land herein stipulated to be granted shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the president of the United States.

145 U.S. at 311. This Court's interpretation of the treaty provision in *Pickering* strongly supports the administrative construction of § 17:

The object of the proviso was not to prevent the alienation of lands *in toto*, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the president, before

affixing his approval, satisfy himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained.

145 U.S. at 316; see also *Lomax v. Pickering*, 173 U.S. 26 (1899); *Smith v. Stevens*, 77 U.S. (10 Wall.) 321 (1870).

This rule that conveyances made in conformity with a restraint on alienation requiring only government approval are valid when so approved is also reflected in the two cases relied upon in *United States v. Candelaria*, 271 U.S. at 442, as applying rules comparable to those of the Nonintercourse Act to Indian grants under Spanish and Mexican law, respectively. *Chouteau v. Moloney*, 57 U.S. (16 How.) 203, 207 (1853); and *United States v. Pico*, 72 U.S. (5 Wall.) 536, 540 (1867). The decision below, thus, conflicts with the requirement that Indian statutes "must be read in light of common notions of the day and the assumptions of those whose drafted them" *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)*

For nearly two centuries, and until the decisions under review, it has uniformly been held that statutes imposing a restraint upon alienation imply the validity of conveyances rendered upon satisfaction of the restraint. The engrafting by the courts below of an additional requirement of express affirmative authorization for the conveyance would unquestionably cloud countless outstanding titles. Certiorari should be granted to correct this fundamental misapprehension of the Nonintercourse Acts and of the Pueblo Lands Act and, further, to prevent unwarranted clouding of long-settled titles.

* Additionally, courts and the Interior Department have repeatedly referred to § 17 as authorizing conveyances subject to the condition of Secretarial approval. See, e.g., *Alonzo v. United States*, 249 F.2d 189, 195 (10th Cir. 1957); *The Legal Status of the Indian Pueblos of New Mexico and Arizona*, 57 I.D. 36, 49 (August 9, 1939); see also *Pueblo of Isleta v. Universal Constructors, Inc.*, 570 F.2d 300, 302 (10th Cir. 1978); F. Cohen, *Federal Indian Law*, 392, 395-96 (Univ. of N.M. reprint, 1942 ed.).

III. The Decision Below Conflict With Decisions of This Court Governing the Implication of Private Rights of Action.

The opinions below raise a question to be resolved in *Oneida Indian Nation of New York v. Oneida County*, 719 F.2d 525 (2nd Cir. 1983), *cert. granted*, 104 S.Ct. 1590 (1984): whether the Nonintercourse Acts preempt any federal common law action for deprivation of tribal property rights allegedly without compliance with federal law; and, concomitantly, whether decisions of this Court preclude the implication of a private right of action on behalf of tribes under the Nonintercourse Act.⁹ For the reasons stated in the dissent of Circuit Judge Meskill in *Oneida*, 719 F.2d at 544-549, certiorari should be granted to resolve the conflict between the decision below and this Court's decisions governing the implication of private civil actions for injunctive and money damage relief. See *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 18-19 (1979).

IV. Certiorari Should Be Granted Because the Decision Below Conflicts With the Decision of This Court in *Nevada v. United States*, 103 S.Ct. 2906 (1983).

The additional holding of the Court of Appeals, affirming the District Court's entry of summary judgment in favor of the Pueblo on Mountain Bell's *res judicata* defense, squarely conflicts with three principles of *Nevada v. United States*, 103 S.Ct. 2906 (1983). First, *Nevada* holds that *res judicata* policies are "at their zenith" with respect to final decrees entered decades ago which confirm interests in real property. 103 S.Ct. at 2918, n.10. Second, *Nevada* holds that a consent decree entered into in

⁹ This issue was not raised in the lower courts. Briefing concluded below on July 8, 1983, prior to the September 29, 1983, decision in *Oneida*. Nonetheless, certiorari should be granted to consider the existence of private rights of action as to the possessory and money damage claims asserted in this action in tandem with the money damage claims asserted in *Oneida*.

conformity with a settlement agreement intended by the parties to finally resolve a controversy has preclusive effect and bars all matters that were the subject of the settlement. 103 S.Ct. at 2910, 2912. Finally, *Nevada* also holds that a consent decree entered against a tribe in a prior action in which it was represented by the United States is *res judicata* of a subsequent action by the tribe asserting claims that previously were settled, without regard to whether the tribe had an opportunity to intervene, was a party, or alleges the United States represented conflicting interests. 103 S.Ct. at 2912-25.

The decision below stands in contravention of these principles. The Court of Appeals' decision acknowledges that the 1928 consent decree was entered in satisfaction of the United States' agreement to dismiss the action if Mountain Bell would obtain Secretarial approval to a § 17 conveyance by the Pueblo. [App. 11] The assertion of the opinion below that the consent decree is deprived of *res judicata* effect because the federal judge may not have reviewed and ratified the settlement agreement [App. 12], conflicts with *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-37 (1975): "A Consent Decree or Order is to be construed for enforcement purposes basically as a contract . . .". Hence, its validity depends not on the intention of the entering court, but on the intention of the parties. See James, *Consent Judgments as Collateral Estoppel*, 108 U.Pa.L.Rev. 173, 175 (1959); see also *Southern Pacific Railroad Co. v. United States*, 168 U.S. 1, 49 (1897).

The decision below, disregarding Mountain Bell's undisputed reliance for over 50 years upon the 1928 consent decree, cannot be reconciled with the decisions of this Court. Significantly, Mountain Bell, in reliance upon the consent decree, took no action to obtain additional authorization for its rights-of-way despite that it was entitled to condemn the same right-of-way at least through the year, 1948. See Act of May 10, 1926, 44 Stat. 498; see also *Plains Electric Generation & Transmission*

Cooperative, Inc. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1976). AT&SF also agreed to the consensual dismissal of quiet title actions filed by the United States for the benefit of Pueblos and, also, took no action to condemn rights-of-way during the period in which it was entitled to do so. Certiorari should be granted to consider the conflict between the decision below and the rulings of this Court; alternatively, this Court should vacate and remand the judgment of the Court of Appeals with directions to reconsider the judgment in light of *Nevada v. United States*, 103 S.Ct. 2906 (1983).

CONCLUSION

For the foregoing reasons, *amicus curiae*, the Atchison, Topeka and Santa Fe Railway Company, prays that a Writ of Certiorari be issued to review the Judgment and the Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 13th day of September, 1984.

ROBERT R. BATESON
General Attorney
SANTA FE INDUSTRIES, INC.
224 South Michigan Avenue
Chicago, Illinois 60604
(312) 347-2265

JOHN R. COONEY
(Counsel of Record)

LYNN H. SLADE

JOHN S. THAL

WALTER E. STERN III

MODRALL, SPERLING, ROEHL,

HARRIS & SISK, P.A.

Post Office Box 2168

500 Fourth Street, N.W.

Suite 1000

Albuquerque, New Mexico 87102

(505) 848-1800

*Attorneys for The Atchison, Topeka
and Santa Fe Railway Company*

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 83-1220

PUEBLO OF SANTA ANA,
vs. *Plaintiff-Appellee,*

THE MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,
Defendant-Appellant.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
Amicus Curiae

PUEBLO DE ACOMA,
Amicus Curiae

PUBLIC SERVICE COMPANY OF NEW MEXICO,
Amicus Curiae

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
(D.C. No. 80-841-M Civ.)

(Filed May 14, 1984)

Scott E. Borg of Luebben & Hughes, Albuquerque, New Mexico, for Plaintiff-Appellee.

Kathryn Marie Krause, Denver, Colorado (Stuart S. Gunckel, Denver, Colorado, with her on the brief) for Defendant-Appellant.

Gary Crosby, Santa Fe Industries, Inc., Chicago, Illinois and John R. Cooney, Lynn H. Slade, John S. Thal and Walter E. Stern, III of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, filed briefs on behalf of Amicus Curiae The Atchison, Topeka and Santa Fe Railway Company. Public Service Company of New Mexico joined in the Amicus Briefs of The Atchison, Topeka and Santa Fe Railway Company.

Arturo G. Ortega of Ortega & Sneed, P.A., Albuquerque, New Mexico and Peter C. Chestnut of Albuquerque, New Mexico, filed a brief on behalf of Amicus Curiae of Pueblo de Acopma.

Before McWILLIAMS BREITENSTEIN and LOGAN,
Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is an interlocutory appeal from the United States District Court for the District of New Mexico which we permitted to be filed. The court granted partial summary judgment to the plaintiff-appellee, Pueblo of Santa Ana, and against the defendant-appellant, Mountain States Telephone and Telegraph Company, Mountain Bell. The dispute involves a right of way for a telephone and telegraph line across Pueblo lands. The trial court held in favor of the Pueblo and Mountain Bell appeals. We affirm.

The Pueblo was the owner of a tract of land situated in New Mexico which was a part of the El Ranchito

Grant. In November, 1927, the United States pursuant to the Pueblo Lands Act, 43 Stat. 636, filed an action in the federal district court for the district of New Mexico entitled United States as Guardian of the Pueblo of Santa Ana v. Brown, No. 1814 Equity (D.N.M. 1928), seeking to quiet title to this tract in the Pueblo. Mountain Bell was party to that suit. During the course of that litigation, the Pueblo entered into a right-of-way agreement with Mountain Bell, dated February 23, 1928, granting an easement to construct, maintain, and operate a telephone and telegraph line, the same line that is in controversy here. Acting pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, 641-642, the Secretary of the Interior approved the agreement. The United States then moved to have Mountain Bell dismissed from the action on the ground that it had obtained title to the right of way through the easement agreement. In granting this motion, the court noted that it appeared "that since the institution of this suit said defendant has secured good and sufficient title to the right of way and premises in controversy. . . ."

In the present action Mountain Bell argues that it obtained a valid right of way across the Pueblo's land in 1928 and under § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636. It argues further that the Pueblo's claims are barred by the 1928 dismissal of the case involving the same parties and issues. On these grounds, Mountain Bell moved for summary judgment that no trespass existed from 1928 to the present. The district court held, however, that § 17 did not authorize conveyance of lands by the Pueblo with the approval of the Secretary. The district court accepted the Pueblo's argument that § 17 was intended as a prohibition against the alienation of Pueblo lands except as Congress may provide in the future. Its requirements of Congressional authorization and Secretarial approval paralleled and were intended to extend to the Pueblo the Nonintercourse Act's requirement of a treaty or convention entered into

pursuant to the Constitution. See Acts of June 30, 1834, 4 Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177), and February 27, 1851, 9 Stat. 574, 587 § 7. The court further held that the Pueblo's claims were not barred by the 1928 dismissal order because that order did not constitute a final judgment.

Section 17 of the Pueblo Lands Act provides:

"No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." [Emphasis supplied.]

Mountain Bell challenges the argument of the Pueblo, upheld by the trial court, that § 17 was intended as an extension of the Pueblos of the Nonintercourse Act, in prohibiting alienation of Pueblo lands except as Congress may provide in the future and as approved by the Secretary. Mountain Bell argues that the first clause of § 17 requires Congressional approval for condemnations and other similar takings of Pueblo lands and that the second clause authorizes a pueblo to alienate its lands if it obtains Secretarial approval. Analysis of these arguments requires an examination of the language, the historical background, the legislative history, and the administrative history of the Act.

The Nonintercourse Act required a treaty or convention to alienate Indian lands, Act of June 30, 1834, 4

Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177). The Act of February 27, 1851, 9 Stat. 574, 587 § 7, extended all laws then in force regulating trade and intercourse with the Indian tribes to include Indian tribes in the Territory of New Mexico.

In *State of New Mexico v. Aamodt*, 10 Cir., 537 F.2d 1102, cert. denied 429 U.S. 1121, a water right case, we reviewed the historical background of the controversy, pp. 1105 and 1109, and pointed out, p. 1105, that the efforts of federal officials to protect the Pueblos' property were frustrated by the New Mexico territorial courts which held that the Pueblos were outside the protection of federal laws. This rationale was upheld by the Supreme Court in *United States v. Joseph*, 94 U.S. 614.

We noted, at p. 1105, that the 1910 New Mexico Enabling Act, 36 Stat. 557, 558-559, defined "Indian country" to include "all lands now owned or occupied by the Pueblo Indians" and stated that such lands are "under the absolute jurisdiction and control of the Congress of the United States." The constitutionality of this provision was upheld in *United States v. Sandoval*, 231 U.S. 28, which specifically overruled *United States v. Joseph*. The Court said, *Id.* at 39, that,

"The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government."

The Court noted that the United States has treated the pueblos "as requiring special consideration and protection, like other Indian communities." *Id.*

Because in the *Joseph* decision the Supreme Court decided that the Pueblo lands were not subject to the protective laws earlier passed by Congress, non-Indians were free to acquire Pueblo lands. The validity of titles so acquired became questionable when in *Sandoval* the Court held that the protective federal statutes did apply

and presumably always had applied. Congress responded with the passage in 1924 of the Pueblo Lands Act, 43 Stat. 636. The Act established a "Pueblo Lands Board" to investigate the Pueblo lands and determine those cases in which the Indian title should be extinguished. The United States as guardian of the Pueblos was required to institute quiet title actions to settle adverse claims to Pueblo lands. Non-Indians claiming title could plead adverse possession and the statute of limitations, defenses not ordinarily available against the United States.

In 1926, the Court in *United States v. Candelaria*, 271 U.S. 432, reaffirmed *Sandoval*. In so doing, it said after referring to the 1834 and 1851 acts, p. 441:

"While there is no express reference in the provision to the Pueblo Indians, we think it must be taken as including them. They are plainly within its sight, and, in our opinion, fairly within its words, 'any tribe of Indians.'"

We echoed this language, noting the application of the Nonintercourse Act to the Pueblo Indians in *Aamodt*, supra. In *Plains Elec. Gen. & Tr. Co-op v. Pueblo of Laguna*, 10 Cir., 542 F.2d 1375, 1376, we cited *Candelaria* as authority for the statement that "Lands of the Pueblos cannot be alienated without the consent of the United States." In *United States v. University of New Mexico*, No. 83-1238, 10 Cir. opinion filed April 9, 1984, we noted that Congress extended the Nonintercourse Act to the Pueblos in 1851 and said that § 17 of the Pueblo Lands Act of 1924 "reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act." Slip Op. at 7. In so doing we noted the following statement in *United States v. Chavez*, 290 U.S. 357, 362:

"[T]he status of the Indians of the several Pueblos in New Mexico is that of dependent Indian tribes under the guardianship of the United States and that

by reason of this status they and their lands are subject to the legislation of Congress enacted for the protection of tribal Indians and their property."

Thus we have three times held that the Pueblo's lands were under the protection of the Nonintercourse Act.

Monutain Bell argues that § 17 was not a grant of power to the Pueblos to convey their lands, but instead reaffirmed the power of alienation which already existed in the Pueblos, and implemented the government's guardianship role by restricting that power. This view is insupportable. The House Report on the Pueblo Lands Act, reprinting the language of the Senate Report, states:

"It was only by the decision of the case of the *United States v. Sandoval* (213 U.S. 28) that the Supreme Court of the United States definitely established the principle that these Indians were wards of the Government. . . .

Up to the time of the decision of the *Sandoval* case in 1913, it had been assumed by both the Territorial and State courts of New Mexico, that the Pueblos has [sic] the right to alienate their property. From earliest times also the Pueblos had invited Spaniards and other non-Indians to dwell with them, and in many cases Pueblos and individual Indians attempted to convey lands to non-Indians which under the decision of the *Sandoval* case they were not competent to do." H.R. Rep. No. 787, 68th Cong., 1st Sess. 2 (1924).

It seems clear, then, that if § 17 is not a delegation of power, the 1928 agreement is void.

The terms of § 17 do not provide such authorization to the pueblos to grant their lands. The two clauses of § 17 of the Pueblo Lands Act are joined by the conjunctive "and." To us that means exactly what it says. No aliena-

tion of the Pueblo lands shall be made "except as may hereafter be provided by Congress" and no such conveyance "shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." Two things are required. First, the lands must be conveyed in a manner provided by Congress. Second, the Secretary of the Interior must approve. As to the first, at the time of the agreement between the Pueblo and Mountain Bell, Congress had provided nothing. Hence, the first condition was not met. The fact that Congress had provided no method makes the approval of the Secretary meaningless. The operation of the second clause depends on compliance with the first clause.

Mountain Bell argues that to give the first clause the meaning which we have approved runs contrary to 25 U.S.C. §§ 311-322 providing among other things for rights of way for telephone and telegraph lines. The answer is that Congress did not extend the application of these statutes to the Pueblo Indians of New Mexico until the Act of April 21, 1928, see 25 U.S.C. § 322, which was after the Secretary had given his approval to the agreement, with Mountain Bell. The Secretary's approval, given on April 13, 1928 says that it was done pursuant to the provisions of § 17 of the Act of June 7, 1924.

Mountain Bell makes much of the legislative history of the Pueblo Lands Act. We have examined the Senate and House reports of the hearings. Hearings before a subcommittee of the Committee on Public Lands and Surveys, on S. 3865 and 4223, 67th Cong. 4th Session; Hearings before the Committee on Indian Affairs on H.R. 13452 and H.R. 13674, 67th Cong. 4th Session. We find that the most that can be said about them is that they are ambiguous and add nothing to the express language of the statute. If it be conceded that the statute is ambiguous, and we do not feel that it is, then as said in *Bryan v. Itasca County*, 426 U.S. 373, 392:

"... we must be guided by that 'eminently sound and vital cannon,' *Northern Cheyenne Tribe v. Hollowbreast* 425 U.S. 649, 655 n. 7 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"

See also *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354.

Mountain Bell says that the administrative construction of the statute supports its contentions. Although the construction put on a statute by the agency charged with administering it is entitled to deference, the courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate or frustrates congressional policy. *SEC v. Sloan*, 436 U.S. 103, 117-118; and *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746. See also *Plateau, Inc. v. Dept. of Interior*, 10 Cir., 603 F.2d 161, 164. In our opinion, the administrative actions on which Mountain Bell relies violate the plain congressional intent of § 17 of the Pueblo Lands Act.

Mountain Bell argues that the Pueblo's claim is barred by the doctrines of *res judicata* and collateral estoppel because of the dismissal of Mountain Bell as a defendant in *United States v. Brown*, supra, No. 1814 Equity (D.N.M. 1928). The *Brown* suit was filed in November of 1927, under the Pueblo Lands Act of June 7, 1924. Mountain Bell neither entered an appearance in the case nor filed an answer. On April 13, 1928, the Assistant Secretary of the Interior approved an agreement between the Pueblo and Mountain Bell for a telephone lines easement across the Pueblo lands. The approval reads "APPROVED, pursuant to the provisions of Section 17 of the Act of June 7, 1924 (43 Stat. L. 636)."

The United States then filed a motion in the Brown case asking the dismissal of Mountain Bell and, as ground for the motion it alleged that,

"subsequent to the institution of this suit said defendant has obtained a deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with Section 17 of the Pueblo Lands Act of June 7, 1924, and that thereby said defendant has obtained, for an adequate consideration, good and sufficient title to the right of way in controversy herein between plaintiff and said defendant."

In its order granting the motion the trial court echoed the language of the motion. It failed to state whether it was with or without prejudice and it was, therefore without prejudice. See *Ex Parte Skinner and Eddy Corp.*, 265 U.S. 86. *Home Owners' Loan Corp. v. Huffman*, 8 Cir., 134 F.2d 314, 317, says that Rule 41 Fed.R.Civ.P., which adopted this standard, followed long established practice in federal courts and is intended to clarify and make definite that practice.

Mountain Bell argues that the three requirements for application of res judicata or collateral estoppel are (1) identity of causes of action, (2) identity of the parties or privity, and (3) a final judgment in the first suit. Only the third need be considered. Mountain Bell says that a voluntary dismissal may be a final judgment for res judicata purposes if it addresses and resolves the issue originally in dispute. In making this argument, Mountain Bell relies largely on cases wherein a consent decree was issued. A consent judgment may assume any of several forms. When entered as a decree of dismissal with prejudice, the judgment is generally preclusive. See *Bradford v. Bonner*, 5 Cir., 665 F.2d 680, 682 and *Bloomer Shippers Ass'n v. Illinois Central Gulf Railroad Co.*, 7 Cir., 655 F.2d 772, 777.

The dismissal order in Brown indicates neither the court's consideration nor approval of the agreement. The court said only that it appeared to the court that the defendant had secured good and sufficient title by a deed from the Pueblo approved by the Secretary of the Interior "in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924." There is no showing that the court was given a copy of the agreement. There were no findings of fact or conclusions of law.

In *National Life & Accident Insurance Co. v. Parkinson*, 10 Cir., 136 F.2d 506, 509, we said:

"Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked."

We have held that the agreement is invalid under § 17 in the absence of congressional action. Mountain Bell would have us hold that the agreement was valid under the action of the district court in dismissing the case without prejudice and making no effort to decide the validity of the agreement. We reject the arguments of res judicata and collateral estoppel.

Pursuant to Rule 56, Fed.R.Civ.P., Mountain Bell moved for a partial summary judgment dismissing the plaintiff's claims for trespass for the period 1928 to date alleging that it is not a trespasser by reason of the April 13, 1928, approval of the Secretary of the Interior. The trial court denied the motion saying, I R. p. 43:

"The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied."

As the Pueblo points out, the commentators generally agree that where there is no genuine issue of fact, the court may enter summary judgment for either party, whether or not such party has made a motion therefor.

See 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2720, at 29-30, "the weight of authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56."

Mountain Bell's motion does not address the claimed trespass prior to 1928, and hence the plaintiff's claim for damages for the period prior to 1928 remains at issue.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 80-841-M Civil

PUEBLO OF SANTA ANA,
Plaintiff,

vs.

MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

(Filed June 2, 1982)

This matter arises on cross motions for summary judgment by defendant, Mountain States Telephone and Telegraph Co., (Telephone) and plaintiff Pueblo of Santa Ana (Pueblo). The parties agree and I find that there are no material issues of fact as to the issues presented. The plaintiff is entitled to judgment as a matter of law as to those issues.

The Pueblo seeks damages from the defendant for a trespass which began in 1907 and has continued to the present. The trespass is a telephone and telegraph line constructed by defendant's predecessor across lands held by the Pueblo in fee simple but subject to federal restraints against alienation. Telephone argues it obtained a valid right of way across the Pueblo's land in 1928 pursuant to § 17 of the Pueblo Lands Act of June 7, 1924.

43 Stat. 636. Telephone also argues plaintiff's claims are barred by the judgment in *United States as Guardian of the Pueblo of Santa Ana v. Brown*, No. 1814 Equity (D.N.M. 1928). The issues presented are: (1) Did Congress, in § 17 of the Pueblo Lands Act, intend to grant to the Pueblos of New Mexico authority to alienate their land? (2) Are Santa Ana's claims barred by the judgment in *U.S. v. Brown*?

THE PUEBLO LANDS ACT

Section 17 of the Pueblo Lands Act provides:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as herein before determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity and unless the [sic] be first approved by the Secretary of Interior.

It is not disputed that the Secretary, on April 12, 1928, approved the right of way granted to Telephone by the Pueblo. Pueblo argues, however, that Telephone could not obtain a valid right of way pursuant to § 17 because § 17 was an extension of the Indian Non-Intercourse Act to the Pueblos of New Mexico, and not a grant of authority to the Pueblos and the Secretary to alienate Pueblo lands. Pueblo maintains § 17's prohibition against the alienation of Pueblo lands except as Congress may provide in the future and its requirement of Secretarial approval closely parallels and was intended to extend to the Pueblos the Non-Intercourse Act's requirement of a treaty or conven-

tion negotiated by an officer of the United States to alienate Indian lands. Acts of June 30, 1834, 4 Stat. 730 § 12, (codified at 25 U.S.C. 177), and February 27, 1851, 9 Stat. 587. Telephone argues the first clause of § 17 refers to condemnation or other similar takings which Congress may authorize in the future and the second clause was intended by Congress to allow grants of Pueblo lands by the Pueblos so long as the approval of the Secretary was first obtained. A brief discussion of the circumstances surrounding the enactment of the Pueblo Lands Act is necessary to an understanding of the issue.

The Pueblo Lands Act was a congressional response to the confusion created by the Supreme Court's conflicting decisions in *U.S. v. Joseph*, 94 U.S. 614 (1876); *U.S. v. Sandoval*, 231 U.S. 28 (1913); and *U.S. v. Candelaria*, 271 U.S. 432 (1925). In *Joseph*, the issue was whether the Pueblos of the Rio Grande Valley of New Mexico were afforded protections under the Indian Non-Intercourse Acts. Acts of June 30, 1834, 4 Stat. 730, § 12 and February 27, 1851, 9 Stat. 587. The Act of June 30, 1834, among other things, forbade the transfer of Indian lands unless the grant "be made by treaty or convention entered into pursuant to the Constitution." Section 12 also requires that the treaty or convention be negotiated by an officer of the United States. The Act of February 27, 1851 extended the protections of the June 30, 1834 Act to the Indian Tribes of the newly acquired Territory of New Mexico. However, the Court in *Joseph* held the Acts did not apply to the Pueblos of New Mexico because, unlike other Indian Tribes, Pueblo land was owned in fee simple and also because the Pueblo Indians were sophisticated such that federal protections were not required. After the decision in *Joseph*, the United States made no effort to prevent encroachment on Pueblo lands.

However, the Court again had the opportunity to consider the status of the Pueblos in *Sandoval* and *Candelaria*. In *Sandoval* the Court held that the Pueblo Indians

were ethnically and historically "Indians" and that Congress had the power to define them as such in the New Mexico Statehood Enabling Act of June 20, 1910, 36 Stat. 557. In *Candelaria*, a quiet title action, the Court was again presented with the question of the applicability of the Indian Non-Intercourse Acts to the Pueblos. Acts of June 30, 1834 and February 27, 1851. In holding that the Pueblos were afforded the protections of the Non-Intercourse Acts, the Court stated,

While there is no express reference in the provision (the provision prohibiting (sic) settlement on Indian Lands in the Act of 1834) to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians.' Although sedentary, industrious and disposed to peace, they are Indians in race, custom and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill prepared to cope with the intelligence and greed of others." 271 U.S. at 442.

The decision in *Candelaria* created uncertainty in New Mexico for those who had settled on Pueblo lands between the time of the decisions in *Joseph* and *Candelaria*. In *Candelaria*, the Court held that the Pueblos were protected by the Non-Intercourse Acts and had been since the Acts were extended to the Pueblos of New Mexico in 1851. Therefore, those who had settled on Pueblo lands in good faith since 1851, were in violation of the Non-Intercourse Acts. The Pueblo Lands Act was Congress' response to this dilemma.

The Act created the Pueblo Lands Board and charged it with the responsibility of investigating title to Pueblo lands and filing actions in Federal District Court to recover certain lands of the Pueblos. Section 3. Other Pueblo lands, where the settlers could establish title un-

der state or territorial law or where they could comply with the statute of limitations contained in Section 4 of the Pueblo Lands Act, were to be awarded to the settlers. Section 5. The Pueblos were to be compensated for property lost to the non-Indian settlers. Section 6.

In the Pueblo Lands Act, Congress was attempting to work an equitable solution to the thorny problem created by uncertainty as to the status of the Pueblo Indians. I am convinced that Congress was also, in § 17, reaffirming through congressional enactment what the Supreme Court decided in *Candelaria*: The Pueblos are Indians and wards of the federal government and Congress intended they be afforded the protections of the Indian Non-Intercourse Acts.

The Tenth Circuit reached a similar conclusion in *Plains Elec. Gen. and Tr. Co-Op. v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir. 1976). In *Plains*, the issue was whether Congress had repealed, by implication, a general Pueblo land condemnation statute by its subsequent enactment of a specific, comprehensive scheme for the acquisition of rights of way across Pueblo lands. In holding there had been a repeal, the Court stated,

The history of these statutes (26 U.S.C. §§ 311-328; statutes providing for the acquisition of rights of way across Pueblo lands) reflects an effort to overcome the problems caused by the unique nature of Pueblo Indian land holdings and to provide them with the same protections given the lands of other Indians. The United States Supreme Court has held that Pueblo lands are subject to such protection, *United States v. Candelaria*, [271 U.S. 432 (1925)] and *United States v. Sandoval*, [231 U.S. 28 (1913)], and the intent of Congress to provide such protection cannot be doubted.

Accordingly, I will determine whether Congress intended § 17 to grant to the Pueblos authority to alienate their

lands with Secretarial approval, by determining whether such a grant of authority is consistent with the Indian Non-Intercourse Acts, and federal Indian policy generally.

The Constitution rests the power to deal with Indian tribes in the Congress. Included in that power is the exclusive right to extinguish Indian titles. Act of June 30, 1834, 4 Stat. 730; *U.S. v. Santa Fe Pacific Rlwy Co.*, 314 U.S. 339, 347 (1941). Congress' intent to authorize alienation of Indian lands must be clear and express. *Chippewa v. U.S.*, 307 U.S. 1 (1939). Doubtful expressions of congressional intent to authorize alienation of Indian land must be resolved in favor "[of the Indian . . . who is] wholly dependent on its [the federal government's] protection and good faith." *U.S. v. Santa Fe Pacific Rlwy Co.*, at 354. Although Congress may delegate its power, the unilateral action of an officer of the Executive Branch cannot alienate land. Whether Congress intended to delegate its authority to alienate Indian lands must be determined against the "strong background of maintenance of congressional control." *Turtle Mountain Band of Chippewa Indians v. U.S.*, 490 F.2d 935, 946 (Ct. Claims 1974).

By the terms of § 17 of the Pueblo Lands Act, there is no authorization for the grant or sale of Pueblo lands. Although such authorization might be inferred from the Section's requirement of Secretarial approval, I decline to do so. The claimed authorization is not clear and express. Furthermore, it would be anomalous to conclude that Congress, having expressed its intention to afford the Pueblos the protection of other Indians, abandoned its objective and completely delegated its authority to the Secretary, with no restrictions, unlike other Indian Tribes. Such irrationality and arbitrariness should not be attributed to the Congress that was attempting to solve the problems created by the Supreme Court's erroneous deci-

sion in *Joseph*. See *Morton v. Mancari*, 417 U.S. 535, 548 (1974).

The construction of § 17 offered by the Pueblo is certainly more reasonable. The Secretary has adopted the construction offered by the Pueblo. 25 C.F.R. 121.22 provides:

Tribal Lands, Lands held in trust by the United States for an Indian Tribe. Lands owned by a tribe with federal restrictions against alienation and any other land owned by an Indian Tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the act of Congress authorizing sale provides that approval is unnecessary. (See 25 U.S.C. 177 [Act of June 30, 1834]).

Although the Secretary has not always construed the Act of June 30, 1834 and § 17 of the Pueblo Lands Act to require congressional authorization (apart from § 17) and the approval of the Secretary, as evidenced by the Secretary's approval of the right of way at issue in this case, the Secretary's differing constructions of § 17 illustrates my conclusion that § 17 was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands.

RES JUDICATA AND COLLATERAL ESTOPPEL

Telephone also argues Pueblo's claim from 1928 to the present is barred by the judgment in *U.S. v. Brown*, No. 1814 Equity (D.N.M. 1928). *Brown* was brought by the United States as guardian of the Pueblo pursuant to § 4 of the Pueblo Lands Act to quiet title to Santa Ana Pueblo lands. In the course of the suit, before Telephone filed its answer, the United States moved to dismiss Telephone on the ground that Telephone had obtained a valid

right of way, the right of way at issue here. Dismissal was ordered the day the motion was filed and the order of dismissal did not state whether the dismissal was with or without prejudice. The dismissal is, therefore, without prejudice. Fed.R.Civ.P. 41; *Homeowners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir. 1943).

Telephone argues that Pueblo's claims from 1928 are *res judicata* and that the Pueblo is collaterally estopped from relitigating the validity of the right of way at issue in this case. A final judgment on the merits is essential in order for an action to be *res judicata*. For collateral estoppel to apply, the factual issue must have been actually litigated and necessarily decided. Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* § 4406 at p. 45; *Craft v. Choate*, No. 81-1893 (10th Cir. Slip Opinion, April 5, 1982). There was no judgment on the merits in *Brown* and the validity of Telephone's right of way was not actually litigated or necessarily decided.

Telephone concedes that it was dismissed from the suit on the pretrial motion of the United States, but it maintains that the dismissal should be afforded the status of a judgment on the merits because of the Court's observation in the order of dismissal that "it appear[ed] to the court that since the institution of this suit, said defendant has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928 by the Secretary of Interior in accordance with the provisions of § 17 of the Pueblo Lands Act of June 7, 1924."

I am not convinced that the court's observation as to the reasons the United States moved for dismissal should elevate the order of dismissal to the status of an order on the merits. Substance must govern over form. The order of dismissal in *Brown* was not an order on the

merits and the issue of the validity of Telephone's right of way was not actually litigated and necessarily decided. It is not uncommon for a court to state in its order of dismissal the reason plaintiff moved for the dismissal. Plaintiff's claims are not *res judicata* and the factual issues present in those claims are not precluded by collateral estoppel.

In conclusion, § 17 of the Pueblo Lands Act was intended by Congress to reaffirm the protections afforded the Pueblos under the Acts of June 30, 1834 and February 27, 1851. It was not intended to grant to the Pueblos and the Secretary *carte blanc* to alienate Pueblo lands for any reason. Plaintiffs claims are not barred by the judgment in *U.S. v. Brown*. The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied.

/s/ E. L. Mechem
United States District Judge

APPENDIX C

Pueblo Land Act of June 7, 1924, Act of June 7, 1924, c. 331, 43 Stat. 636, as amended by Act of May 31, 1933, c. 45, § 7, 48 Stat. 111, provides:

"1. That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the United States of America, in its sovereign capacity as guardian of said Pueblo Indians shall, by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined.

"2. That there shall be, and hereby is, established a board to be known as 'Pueblo Lands Board' to consist of the Secretary of the Interior, the Attorney General, each of whom may act through an assistant in all hearings, investigations, and deliberations in New Mexico, and a third member to be appointed by the President of the United States. The board shall be provided with suitable quarters in the city of Santa Fe, New Mexico, and shall have power to require the presence of witnesses and the production of documents by subpoena, to employ a clerk who shall be empowered to administer oaths and take acknowledgments, shall employ such clerical assistance, interpreters, and stenographers with such compensation as the Attorney General shall deem adequate, and it shall be provided with such necessary supplies and equipment as it may require on requisitions to the Department of Justice. The compensation and allowance for travel and expenses of the member appointed by the President shall be fixed by the Attorney General.

"It shall be the duty of said board to investigate, determine, and report and set forth by metes and bounds, illustrated where necessary by field notes and plats, the

lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the said board shall find not to have been extinguished in accordance with the provisions of this Act, and the board shall not include in their report any claims of non-Indian claimants who, in the opinion of said board after investigation, hold and occupy such claims of which they have had adverse possession, in accordance with the provisions of section 4 of this Act: Provided, however, That the board shall be unanimous in all decisions whereby it shall be determined that the Indian title has been extinguished.

"The board shall report upon each pueblo as a separate unit and upon the completion of each report one copy shall be filed with the United States District Court for the District of New Mexico, one with the Attorney General of the United States, one with the Secretary of the Interior, and one with the Board of Indian Commissioners.

"3. That upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in the United States District Court for the District of New Mexico, as provided in section 1 of this Act, a suit to quiet title to the lands described in said report as Indian lands the Indian title to which is determined by said report not to have been extinguished.

"4. That all persons claiming title to, or ownership of, any lands involved in any such suit, or suits, may in addition to any other legal or equitable defenses which they may have or have had under the laws of the Territory and State of New Mexico, plead limitation of action, as follows, to wit:

"(a) That in themselves, their ancestors, granted privies, or predecessors in interest or claim of interest,

they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed, under color of title from the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation, or adverse possession of the Territory or of the State of New Mexico, since the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

"(b) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed with claim of ownership, but without color of title from the 16th day of March, 1889, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation or adverse possession of the Territory or of the State of New Mexico, from the 16th day of March, 1899, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

"Nothing in this Act contained shall be construed to impair or destroy any existing right of the Pueblo Indians of New Mexico to assert and maintain unaffected by the provisions of this Act their title and right to any land by original proceedings, either in law or equity, in any court of competent jurisdiction and any such right may be asserted at any time prior to the filing of the field notes and plats as provided in section 13 hereof, and jurisdiction with respect to any such original proceedings is hereby conferred upon the United States District Court for the District of New Mexico with right of review as in other cases: Provided, however, That any contract entered into with any attorney or attorneys by the Pueblo

Indians of New Mexico, to carry on such litigation shall be subject to and in accordance with existing laws of the United States.

"5. The plea of such limitations, successfully maintained, shall entitle the claimants so pleading to a decree in favor of them, their heirs, executors, successors, and assigns for the premises so claimed by them, respectively, or so much thereof as may be established, which shall have the effect of a deed of quit-claim as against the United States and said Indians, and a decree in favor of claimants upon any other ground shall have a like effect.

"The United States may plead in favor of the pueblo, or any individual Indian thereof, as the case might be, the said limitations hereinbefore defined.

"6. It shall be the further duty of the board to separately report in respect of each such pueblo—

"(a) The area and character of any tract or tracts of land within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico and the extent, source, and character of any water right appurtenant thereto in possession of non-Indian claimants at the time of filing such report, which are not claimed for said Indians by any report of the board.

"(b) Whether or not such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians. Seasonable prosecution is defined to mean prosecution by the United States within the same period of time as that within which suits to recover real property could have been brought under the limitation statutes of the Territory and State of New Mexico.

"(c) The fair market value of said water rights and of said tract or tracts of land (exclusive of any improvements made therein or placed thereon by non-Indian

claimants) whenever the board shall determine that such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians, and the amount of loss, if any, suffered by said Indians through failure of the United States seasonably to prosecute any such right.

"The United States shall be liable, and the board shall award compensation, to the pueblo within the exterior boundaries of whose lands such tract or tracts of land shall be situated or to which such water rights shall have been appurtenant to the extent of any loss suffered by said Indians through failure of the United States seasonably to prosecute any right of the United States or of said Indians, subject to review as herein provided. Such report and award shall have the force and effect of a judicial finding and final judgment upon the question and amount of compensation due to the Pueblo Indians from the United States for such losses. Such report shall be filed simultaneously with and in like manner as the reports hereinbefore provided to be made and filed in section 2 of this Act.

"At any time within sixty days after the filing of said report with the United States District Court for the District of New Mexico as herein provided the United States or any pueblo or Indians concerned therein or affected thereby may, in respect of any report upon liability or of any finding of amount or award of compensation set forth in such report, petition said court for judicial review of said report, specifying the portions thereof in which review is desired. Said court shall thereupon have jurisdiction to review, and shall review, such report, finding, or award in like manner as in the case of proceedings in equity. In any such proceeding the report of the board shall be prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be re-

butted by competent evidence. Any party in interest may offer evidence in support or in opposition to the findings in said report in any respect. Said court shall after hearing render its decision so soon as practicable, confirming, modifying, or rejecting said report or any part thereof. At any time within thirty days after such decision is rendered said court shall, upon petition of any party aggrieved, certify the portions of such report, review of which has been sought, together with the record in connection therewith, to the United States Circuit Court of Appeals for the Eighth Circuit, which shall have jurisdiction to consider, review, and decide all questions arising upon such report and record in like manner as in the case of appeals in equity, and its decision thereon shall be final.

"Petition for review of any specific finding or award of compensation in any report shall not affect the finality of any findings nor delay the payment of any award set forth in such report, review of which shall not have been so sought, nor in any proceeding for review in any court under the provisions of this section shall costs be awarded against any party.

"7. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior who shall report to the Congress of the United States, together with his recommendation, the fair market value of lands, improvements appurtenant thereto, and water rights of non-Indian claimants who, in person or through their predecessors in title prior to January 6, 1912, in good faith and for a valuable consideration purchased and entered upon Indian lands under a claim of right based upon a deed or document purporting to convey title to the land claimed or upon a grant, or license from the governing body of a pueblo to said land, but fail to sustain such claim under the provisions of this Act, together with a statement of the loss in money value thereby suffered by such non-Indian claimants. Any lands

lying within the exterior boundaries of the pueblo of Nambe land grant, which were conveyed to any holder or occupant thereof or his predecessor or predecessors in interest by the governing authorities of said pueblo, in writing, prior to January 6, 1912, shall unless found by said board to have been obtained through fraud or deception, be recognized as constituting valid claims by said board and by said courts, and disposed of in such manner as lands the Indian title to which has been determined to have been extinguished pursuant to the provisions of this Act: Provided, That nothing in this section contained with reference to the said Nambe Pueblo Indians shall be construed as depriving the said Indians of the right to impeach any such deed or conveyance for fraud or to have mistakes therein corrected through a suit in behalf of said pueblo or of an individual Indian under the provisions of this Act.

"8. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior the area and the value of the lands and improvements appurtenant thereto of non-Indian claimants within or adjacent to Pueblo Indian settlements or towns in New Mexico, title to which in such non-Indian claimants is valid and indefeasible, said report to include a finding as to the benefit to the Indians in anywise of the removal of such non-Indian claimants by purchase of their lands and improvements and the transfer of the same to the Indians, and the Secretary of the Interior shall report to Congress the facts with his recommendations in the premises.

"9. That all lands, the title to which is determined in said suit or suits, shall, where necessary, be surveyed and mapped under the direction of the Secretary of the Interior, at the expense of the United States, but such survey shall be subject to the approval of the judge of the United States District Court for the District of New Mexico, and if approved by said judge shall be filed in

said court and become a part of the decree or decrees entered in said district court.

"10. That necessary costs in all original proceedings under this Act, to be determined by the court, shall be taxed against the United States and any party aggrieved by any final judgment or decree shall have the right to a review thereof by appeal or writ of error or other process, as in other cases, but upon such appeal being taken each party shall pay his own costs.

"11. That in the sense in which used in this Act the word 'purchase' shall be taken to mean the acquisition of community lands by the Indians other than by grant or donation from a sovereign.

"12. That any person claiming any interest in the premises involved but not impleaded in any such action may be made a party defendant thereto or may intervene in such action, setting up his claim in usual form.

"13. That as to all lands within the exterior boundaries of any lands granted or confirmed to the Pueblo Indians of New Mexico, by any authority of the United States of America or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise and which have not been claimed for said Indians by court proceedings then pending or the findings and report of the board as herein provided, the Secretary of the Interior at any time after two years after the filing of said reports of the board shall file field notes and plat for each pueblo in the office of the surveyor general of New Mexico at Santa Fe, New Mexico, showing the lands to which the Indian title has been extinguished as in said report set out, but excluding therefrom lands claimed by or for the Indians in court proceedings then pending, and copies of said plat and field notes certified by the surveyor general of New Mexico as true and correct copies shall be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and in-

terest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same. And the Secretary of the Interior within thirty days after the Indians' right to bring independent suits under this Act shall have expired, shall cause notice to be published in some newspaper or newspapers of general circulation issued, if any there be, in the county wherein lie such lands claimed by non-Indian claimants, respectively, or wherein some part of such lands are situated, otherwise in some newspaper or newspapers of general circulation published nearest to such lands, once a week for five consecutive weeks, setting forth as nearly as may be the names of such non-Indian claimants of land holdings not claimed by or for the Indians as herein provided, with a description of such several holdings, as shown by a survey of Pueblo Indian lands heretofore made under the direction of the Secretary of the Interior and commonly known as the 'Joy Survey,' or as may be otherwise shown or defined by authority of the Secretary of the Interior, and requiring that any person or persons claiming such described parcel or parcels of land or any part thereof, adversely to the apparent claimant or claimants so named as aforesaid, or their heirs or assigns, shall, on or before the thirtieth day after the last publication of such notice, file his or their adverse claim in the United States Land Office in the land district wherein such parcel or parcels of land are situate, [sic] in the nature of a contest, stating the character and basis of such adverse claim, and notice of such contest shall be served upon the claimant or claimants named in the said notice, in the same manner as in cases of contest of homestead entries. If no such contest is instituted as aforesaid, the Secretary of the Interior shall issue to the claimant or claimants, or their heirs or assigns, a patent or other certificate of title for the parcel or parcels of land so described in said notice; but if a contest be filed it shall proceed and be heard and decided as contests of homestead entries are heard and

decided under the rules and regulations of the General Land Office pertinent thereto. Upon such contest either party may claim the benefit of the provisions of section 4 of this Act to the same extent as if he were a party to a suit to quiet title brought under the provisions of this Act, and the successful party shall receive a patent or certificate of title for the land as to which he is successful in such proceeding. Any patent or certificate of title issued under the provisions of this Act shall have the effect only of a relinquishment by the United States of America and the said Indians.

"If after such notice more than one person or group of persons united in interest makes claim in such land office adverse to the claimant or claimants named in the said notice, or to any other person or group of persons who may have filed such contest, each contestant shall be required to set forth the basis and nature of his respective claim, and thereupon the said claims shall be heard and decided as upon an original contest or intervention.

"And in all cases any person or persons whose right to a given parcel or parcels of land has become fixed either by the action of the said board or the said court or in such contest may apply to the Commissioner of the General Land Office for a patent or certificate of title and receive the same without cost or charge.

"14. That if any non-Indian party to any such suit shall assert against the Indian title a claim based upon a Spanish or Mexican grant, and if the court should finally find that such claim by the non-Indian is superior to that of the Indian claim, no final decree or judgment of ouster of the said Indians shall be entered or writ of possession or assistance shall be allowed against said Indians, or any of them, or against the United States of America acting in their behalf. In such case the court shall ascertain the area and value of the land thus held by any non-Indian claimant under such superior title, excluding therefrom the area and value of lots or parcels of land the title to

which has been found to be in other persons under the provisions of this Act: Provided, however, That any findings by the court under the provisions of this section may be reviewed on appeal or writ of error at the instance of any party aggrieved thereby, in the same manner, to the same extent, and with like effect as if such findings were a final judgment or decree. When such findings adverse to the Indian claim has become final, the Secretary of the Interior shall report to Congress the facts, including the area and value of the land so adjudged against the Indian claim, with his recommendations in the premises.

"15. That when any claimant, other than the United States for said Indians not covered by the report provided for in section 7 of this Act, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, purchase, or donation under the provisions of this Act, but has held and occupied any such parcel in good faith, claiming the same as his own, and the same has been improved, the value of the improvements upon the said parcel of land shall be found by the court and reported by the Secretary of the Interior to Congress, with his recommendations in the premises.

"16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated

as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

"17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the lands of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

"18. That the pleading, practice, procedure, and rules of evidence shall be the same in all causes arising under this Act as in other civil causes in the Federal courts, except as otherwise herein provided.

"19. That all sums of money which may hereafter be appropriated by the Congress of the United States for the purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any Pueblo or to any of the Indians of any pueblo, shall be paid over to the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost to said pueblo or to said Indians, or for purchase or construction of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians."

APPENDIX D

Act of June 30, 1834, c. 161, Section 12, 4 Stat. 730,
25 U.S.C. § 177

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

MOTION FILED

SEP 13 1984

(3)

No. 84-262

**IN THE
Supreme Court of the United States**

October Term, 1984

**THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,
*Petitioner,***

v.

**PUEBLO OF SANTA ANA,
*Respondent.***

**ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**MOTION OF PUBLIC SERVICE COMPANY OF
NEW MEXICO FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND AMICUS BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Robert H. Clark
Counsel of Record

Clyde F. Worthen
Paula Z. Hanson
KELEHER & McLEOD, P.A.
Post Office Drawer AA
Albuquerque,
New Mexico 87103
(505) 842-6262
*Counsel for Amicus Curiae,
Public Service Company
of New Mexico*

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No. 84-262

IN THE
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October Term, 1984

THE MOUNTAIN STATES TELEPHONE
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OF NEW MEXICO FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Pursuant to Rule 36.1 of the Rules for the United States Supreme Court, Public Service Company of New Mexico ("PNM") respectfully moves the Court for leave to file a brief *amicus curiae* in the above entitled cause. Counsel for petitioner, Mountain States Telephone and Telegraph Company, has consented to the filing of this *amicus* brief. Counsel for respondent, Pueblo of Santa Ana, advised counsel for PNM in August 1984 that respondent con-

sented to the filing of this brief; however, on September 6, 1984, counsel for respondent retracted that consent.

PNM is a public utility organized under the laws of the State of New Mexico and is primarily engaged in the generation, transmission and sale of electricity to consumers in New Mexico. The question presented in the instant case is of substantial importance to PNM because it has acquired a number of rights-of-way for electric transmission lines across the lands of various New Mexico Pueblos. PNM's interest, which is more fully set forth in the attached Brief in Support of Petition for Writ Certiorari, is based upon the substantial and potentially far-reaching ramifications of the Tenth Circuit's decision on rights-of-way that PNM and other utilities have utilized across Pueblo lands for five or more decades. PNM is also concerned that this Court should be aware that a decision here may substantially undermine the relationship between New Mexico Pueblos and those with whom they conduct business.

For the reasons set forth herein and in PNM's Brief in Support of Petition for Writ of Certiorari, PNM respectfully requests this opportunity to present its views on the instant case to this Court and urges the Court to grant its Motion for leave to file the accompanying *amicus* brief in support of the Petition.

By _____
Robert H. Clark
Counsel of Record
Clyde F. Worthen
Paula Z. Hanson
KELEHER & McLEOD, P.A.
Post Office Drawer AA
Albuquerque,
New Mexico 87103
(505) 842-6262
Counsel for Amicus Curiae,
Public Service Company
of New Mexico

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**ON PETITION FOR WRIT OF CERTIORARI TO THE
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**BRIEF OF PUBLIC SERVICE COMPANY OF NEW MEXICO,
AMICUS CURIAE, IN SUPPORT OF
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i
TABLE OF CONTENTS

	Page(s)
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTEREST OF PUBLIC SERVICE COMPANY OF NEW MEXICO	1
ARGUMENT AND SUMMARY OF ARGUMENT	5
A WRIT OF CERTIORARI SHOULD ISSUE TO SETTLE A QUESTION THAT HAS NOT HERETO- FORE BEEN CONSIDERED BY THIS COURT AS TO THE CONSTRUCTION OF SECTION 17 OF THE PUEBLO LANDS ACT.	5
A. The Decision Is Contrary to the Express Language of Section 17 of the Pueblo Lands Act.	5
B. The Decision Is at Odds with the Reasons for which Congress Enacted the Pueblo Lands Act.	6
C. The Decision Conflicts with the Reasonable Inter- pretation Given the Pueblo Lands Act by the Administrative Agency Charged with its Enforce- ment.	7
D. The Decision Condemns Pueblo Coveyances made with Secretarial Approval and is therefore in Contravention of Previous Decisions of this Court Respecting the Indian Non-Intercourse Act. ...	7
CONCLUSION	8
PROOF OF SERVICE	

ii
TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Administrator, Federal Aviation Administration v. Robertson,</i> 422 U.S. 255 (1975)	6
<i>Johnson v. M'Intosh</i> 8 Wheat. 543 (1823)	7
<i>Mitchel v. United States</i> 9 Pet. 711 (1835)	7-8
<i>Morton v. Ruiz</i> 415 U.S. 199 (1974)	7
<i>Patterson v. Lamb</i> 329 U.S. 539 (1947)	7
<i>United States v. Candelaria</i> 271 U.S. 432 (1926)	6
<i>United States v. Joseph</i> 94 U.S. 614 (1877)	6
<i>United States v. Sandoval</i> 231 U.S. 28 (1913)	6

iii
STATUTES

<i>Act of June 30, 1834,</i> 4 Stat. 730, 25 U.S.C. § 177 (1970)	7
<i>Pueblo Lands Act,</i> Act of June 7, 1924, 43 Stat. 636	<i>passim</i>

OTHER AUTHORITIES

	Page(s)
F. Cohen, <i>Handbook of Federal Indian Law</i> (1942 Ed., Univ. of N.M. Press Reprint)	7

LEGISLATIVE MATERIAL

1923 Senate Hearings 72-73, 154-155, 229	6
1923 House Hearings, 40-41	6

1
**BRIEF OF PUBLIC SERVICE COMPANY OF NEW MEXICO,
AMICUS CURIAE, IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

Amicus Curiae, Public Service Company of New Mexico ("PNM"), submits this Brief in Support of the Petition for Writ of Certiorari filed by Mountain States Telephone and Telegraph Company ("Mountain Bell"). Mountain Bell has consented to the filing of this brief. The Pueblo of Santa Ana initially consented thereto, but subsequently retracted that consent. Accordingly, PNM has submitted a motion for leave to file this brief pursuant to Rule 36.1 of the Rules for the United States Supreme Court.

PNM respectfully submits that a Writ of Certiorari should be granted to review the opinion of the United States Court of Appeals for the Tenth Circuit entered in the captioned cause on May 14, 1984.

**INTEREST OF PUBLIC SERVICE COMPANY
OF NEW MEXICO**

PNM is a New Mexico corporation, primarily engaged in the generation, transmission and sale of electricity to over half a million consumers in New Mexico. PNM serves the major metropolitan areas of central and north-central New Mexico. Its service area surrounds and includes several Pueblos. In the sixty miles between the metropolitan areas of Santa Fe and Albuquerque, PNM provides electric service to the residents of the Pueblos of Cochiti, Santa Domingo, San Felipe, Santa Ana and Sandia. To the south of Albuquerque, PNM provides electric service to smaller New Mexico cities and to the Pueblo of Isleta. PNM must utilize rights-of-way for its electric transmission lines to provide economical electric service to its customers. As a practical matter, PNM's power lines must cross Pueblo

lands and PNM has therefore over the years acquired a number of rights-of-way across the lands of various New Mexico Pueblos.

Briefly stated, the primary question presented for review is whether the Tenth Circuit's holding—that rights-of-way conveyed by Pueblo Indians pursuant to Section 17 of the Pueblo Lands Act (*Act of June 7, 1924*, 43 Stat. 636) are invalid—is proper. PNM's interest is predicated upon the potentially severe consequences a decision in this case may have on the delivery of electricity to Indian and non-Indian consumers in New Mexico and on the rights-of-way it has obtained and utilized across Pueblo lands for half a century or longer. PNM believes this Court should be aware of the ramifications of the decision below to PNM, and other utilities, which must utilize rights-of-way across Pueblo lands to deliver essential public services. For these reasons, PNM is presenting its concerns regarding this case and apprising the Court that the opinion sought to be reviewed will have an impact upon persons other than the parties to this action.

In the early decades of this century, PNM acquired several rights-of-way across Pueblo lands pursuant to Section 17 of the Pueblo Lands Act ("Section 17"). These rights-of-way were for a limited term of fifty years and are not inconsistent with other uses of Pueblo lands, including grazing and agriculture. Litigation is presently pending in the United States District Court for the District of New Mexico wherein the legality of six of the rights-of-way PNM utilizes across Pueblo lands is being challenged: *Pueblo of Isleta v. Albuquerque Gas and Electric Company and Public Service Company of New Mexico* (U.S. District Court No. CIV 82-1535 C) (the "Isleta Lawsuit"); and *United States of America on behalf of the Pueblos of Isleta, Sandia, San Felipe, Santa Ana and Santa Domingo v. Public Service Company of New Mexico* (U.S. District Court No. CIV 82-1483 C) (the "Pueblos Lawsuit"). These cases have been stayed by Order of United States District Judge Santiago Campos pending the final outcome on appeal of the instant case.

ISLETA LAWSUIT. In the Isleta Lawsuit, the Isleta Pueblo challenges the validity of a right-of-way PNM is utilizing across the Pueblo. Isleta Pueblo asserts that this right-of-way is void because it was conveyed pursuant to Section 17 without separate congressional approval. In obtaining this right-of-way Albuquerque Gas and Electric Company ("AG&E"), the name by which PNM was formerly known, complied with the law as it was interpreted by the Department of the Interior, the agency charged with regulating certain transactions affecting Pueblo lands.

Isleta Pueblo agreed to convey the right-of-way to AG&E. Granting of this right-of-way was approved by the Governor and Lieutenant Governor of Isleta Pueblo, by six other members of the Pueblo and by the attorney for the Pueblo. The Superintendent of the United Pueblos of New Mexico, under whose jurisdiction Isleta Pueblo fell, also approved the right-of-way agreement and recommended its approval to the Secretary of the Interior. The Secretary approved the grant in October 1936. The Pueblo received valuable consideration for the right-of-way and has benefited from its existence. AG&E built a power line on the right-of-way thus acquired. PNM has openly and notoriously utilized the right-of-way for forty-six years in reliance on the Department of the Interior's reasonable interpretation of Section 17. The Pueblo did not contest the validity of this right-of-way until 1982, when it filed suit relying on the District Court's decision in the captioned cause.

Now, after nearly fifty years, the Pueblo alleges that Section 17 requires more than approval by the Pueblo, by the United Pueblos Superintendent and the Secretary of the Interior for the right-of-way to be granted; that the right-of-way is invalid and that therefore PNM has been trespassing upon its land since 1936. The decision in the instant case may determine the outcome of the Isleta Lawsuit.

PUEBLOS LAWSUIT. In the Pueblos Lawsuit, the United States sued on behalf of the Pueblos of Isleta, Sandia, San Felipe, Santa Ana, and Santa Domingo alleging that six rights-of-way across Pueblo lands are invalid because they were obtained pursuant to Section 17. (One of the rights-of-way at issue in this case is identical to the one at issue in the Isleta Lawsuit.) The rights-of-way being challenged were granted to AG&E in 1926, 1928 and 1936. AG&E complied with the law as it was interpreted by the Department of the Interior in obtaining these rights-of-way.

Again, AG&E entered into agreements with the various Pueblos to obtain the rights-of-way and the same were approved by the Secretary of the Interior. The Pueblos received valuable consideration and benefited from the existence of these rights-of-way. PNM utilized these rights-of-way for at least five decades on the reasonable, and until recently, unquestioned, assumption that the federal agency charged with regulating Pueblo lands had properly interpreted and applied the law.

In addition to the rights-of-way at issue in the two cases discussed above, PNM may have other rights-of-way for electric transmission lines which were obtained pursuant to Section 17. The outcome of the instant action may affect the validity of these rights-of-way. It may also determine whether PNM will be subjected to additional lawsuits by the Pueblos seeking PNM's ejectment from these rights-of-way and trespass damages. Because the decision in this case will affect broad interests throughout the State of New Mexico and because the decision of the Tenth Circuit misinterprets Section 17, PNM respectfully prays that this Court issue its Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

ARGUMENT AND SUMMARY OF ARGUMENT

A WRIT OF CERTIORARI SHOULD ISSUE TO SETTLE A QUESTION THAT HAS NOT HERETOFORE BEEN CONSIDERED BY THIS COURT AS TO THE CONSTRUCTION OF SECTION 17 OF THE PUEBLO LANDS ACT.

The Writ of Certiorari here requested should be granted to consider whether Section 17 allowed Pueblo Indians, with secretarial approval, to convey rights-of-way to non-Indians. It is the position of the petitioner, Mountain Bell, and this *amicus*, that the decision below incorrectly construes Section 17 to invalidate such conveyances and over fifty years of administrative practice. The decision therefore disrupts relationships between the Pueblos and persons conducting business with them. PNM will not here reiterate in detail the arguments presented to this Court in Mountain Bell's Petition. PNM, with the consent of Mountain Bell, joins in and supports Mountain Bell's arguments regarding the construction and interpretation of Section 17.

To summarize, it is the position of PNM that this Court should review the decision of the Tenth Circuit for the reasons outlined below.

A. THE DECISION IS CONTRARY TO THE EXPRESS LANGUAGE OF SECTION 17 OF THE PUEBLO LANDS ACT.

Section 17 of the Pueblo Lands Act provides, among other things, that "no sale, grant or lease of any character or other conveyance of lands . . . made by any Pueblo . . . shall be of any validity . . . unless the same be first approved by the Secretary of the Interior." The Tenth Circuit found that no sale, grant or lease made by any Pueblo after enactment of the Pueblo Lands Act was valid, even though such conveyance was approved by the Secretary of the Interior pursuant to Section 17. The Tenth Circuit interpreted the Act to require additional action by Congress before the Pueblos were empowered to make convey-

ances. Unless or until Congress acted, said the Tenth Circuit, the Pueblos were incompetent to convey any interest in their lands. Such an interpretation ignores the express language of the Act. It also ignores established rules of statutory construction in that it renders the second clause of Section 17 a nullity. *Administrator, Federal Aviation Administration v. Robertson*, 422 U.S. 255 (1975). A Writ of Certiorari therefore should issue to review the construction given Section 17 by the Court of Appeals.

B. THE DECISION IS AT ODDS WITH THE REASONS FOR WHICH CONGRESS ENACTED THE PUEBLO LANDS ACT.

At the time the Pueblo Lands Act was passed, it was understood that Pueblo Indians had the power to convey land with secretarial approval. 1923 Senate Hearings 72-73, 154-155, 229; 1923 House Hearings, 40-41. See also, *United States v. Candelaria*, 271 U.S. 432 (1926). The Tenth Circuit read the Pueblo Lands Act to strip the Pueblo Indians of this vested power. This power would not be restored to the Pueblo Indians until such time as Congress enacted further legislation providing specific avenues of conveyance. Such a conclusion is illogical in light of the reasons for which Congress enacted the Pueblo Lands Act. 1923 Senate Hearings, 72-73, 154-155. By the Pueblo Lands Act, Congress intended to settle the confusion surrounding title to Pueblo lands which resulted from the decisions in *United States v. Joseph*, 94 U.S. 614 (1877) and *United States v. Sandoval*, 321 U.S. 28 (1913). Nowhere in the Congressional Record relating to the passage of this Act is there an indication that it was intended to deprive the Pueblos of their ability, with secretarial approval, to alienate their land.

This Court should issue its Writ to decide whether the Pueblo Lands Act stripped the Pueblos of their power to make conveyances absent a subsequent Act of Congress.

C. THE DECISION CONFLICTS WITH THE REASONABLE INTERPRETATION GIVEN THE PUEBLO LANDS ACT BY THE ADMINISTRATIVE AGENCY CHARGED WITH ITS ENFORCEMENT.

The Pueblo Lands Act was contemporaneously interpreted to allow Pueblo Indians to make conveyances with secretarial approval and without a subsequent Act of Congress. See, F. Cohen, *Handbook of Federal Indian Law*, at 104 (1942). This contemporaneous interpretation of the Act is amply evidenced by the right-of-way at issue in the instant case and by the six rights-of-way at issue in the above-referenced litigation against PNM. The Tenth Circuit's decision directly contravenes the administrative interpretation given Section 17 by the Department of the Interior. This interpretation should be given deference. See, *Morton v. Ruiz*, 415 U.S. 199, 201-202 (1974); and *Patterson v. Lamb*, 329 U.S. 539, 541 (1974). This Court should therefore issue its Writ to restore the reasonable interpretation given the Pueblo Lands Act by the Department of the Interior.

D. THE DECISION CONDEMNS PUEBLO CONVEYANCES MADE WITH SECRETARIAL APPROVAL AND THEREFORE IS IN CONTRAVENTION OF PREVIOUS DECISIONS OF THIS COURT RESPECTING THE INDIAN NON-INTERCOURSE ACT.

The Indian Non-Intercourse Act (Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. §177), and its predecessor enactments, were not intended to prohibit alienation of Indian land. See, F. Cohen, *Handbook of Federal Indian Law*, *supra*, at 323. Rather, the Act was intended to allow alienation with governmental approval. *Id.* Section 17 met this condition by requiring approval by the Secretary of the Interior before Pueblo conveyances were valid. The Tenth Circuit's opinion, that secretarial approval is insufficient to validate Pueblo conveyances, is at odds with this Court's interpretation of the Indian Non-Intercourse Act and its predecessors as enunciated in *Johnson v. M'Intosh*, 8 Wheat. 543 (1823); and *Mitchel v. United*

States, 9 Pet. 711 (1835). These cases recognized the inherent power of Indians to alienate their land so long as governmental approval was obtained. A Writ of Certiorari should issue to resolve this conflict between the Tenth Circuit's opinion and the previous decisions of this Court.

CONCLUSION

For the reasons stated herein and in Mountain Bell's Petition for Writ of Certiorari, PNM respectfully prays that a Writ of Certiorari issue to review the May 14, 1984, opinion of the United States Court of Appeals for the Tenth Circuit. PNM also prays that, upon consideration of the merits, this Court reverse the Tenth Circuit's decision and find that Section 17 of the Pueblo Lands Act authorized the Pueblo Indians, with approval of the Secretary of the Interior, to grant rights-of-way across their lands to non-Indians.

Respectfully submitted,

Robert H. Clark
Counsel of Record
 Clyde F. Worthen
 Paula Z. Hanson
 KELEHER & McLEOD, P.A.
 P.O. Drawer AA
 Albuquerque,
 New Mexico 87103
 (505) 842-6262

Counsel for Amicus Curiae,
 Public Service Company
 of New Mexico

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PUEBLO OF SANTA ANA,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE
 UNITED STATES COURT OF APPEALS
 FOR THE TENTH CIRCUIT**

PROOF OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Public Service Company of New Mexico, *amicus curiae* herein, hereby certifies that on 12 September, 1984, pursuant to Rule 33 of the Rules for the United States Supreme Court, service of the Motion for Leave to File Brief *Amicus Curiae* and Brief of *Amicus Curiae* Public Service Company of New Mexico in Support of Petition for Writ of Certiorari was made upon:

Gilbert M. Westa, Esq.
Kathryn Marie Krause, Esq.
931 14th Street, Suite 1300
Denver, Colorado 80202
Counsel of Record for Petitioner

and

Richard W. Hughes, Esq.
Scott E. Borg, Esq.
201 Broadway, S.E.
Albuquerque, New Mexico 87103
Counsel of Record for Respondent

by depositing three correct copies of same in the United States Post Office, Albuquerque, New Mexico, with first class postage prepaid, properly addressed to Counsel of Record listed above.

All parties required to be served have been served.
DATED: 12 September, 1984.

Robert H. Clark
Counsel of Record
Clyde F. Worthen
Paula Z. Hanson
KELEHER & McLEOD, P.A.
P.O. Drawer AA
Albuquerque, New Mexico 87103
(505) 842-6262
Counsel for Amicus Curiae,
Public Service Company
of New Mexico

FILED

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CLERK

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No. 84-262

In The
Supreme Court of the United States

October Term, 1984

MOUNTAIN STATES TELEPHONE AND
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Petitioner,

vs.

PUEBLO OF SANTA ANA,

Respondent.

**PETITIONER'S REPLY BRIEF TO RESPONDENT'S
BRIEF IN OPPOSITION TO CERTIORARI**

KATHRYN MARIE KRAUSE, Esq.
(Counsel of Record)
MARY C. SNOW, Esq.
931 14th Street, Room 1300
Denver, Colorado 80202
(303) 624-2200

Attorneys for Petitioner

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	i
I. The Pueblo's Assertion That Congress Must Employ Affirmative Language When Au- thorizing the Secretary to Approve Pueblo Conveyances is Erroneous and Highlights the Conflict Between This Court's Interpretation of the Non-Intercourse Act and the Lower Court's Opinion.	1
II. Appendices 1 and 2 of the Brief in Opposi- tion Support the Agency Construction of the Act and Contradict the Tenth Circuit Hold- ing.	5
Conclusion	9

TABLE OF AUTHORITIES

CASES:	Pages
<i>Barnett v. Equity Trust Co.</i> , 21 F.2d 325 (3d Cir. 1927), <i>app. dismissed, sub nom American Baptist Home Mission Soc. v. Barnett</i> , 26 F.2d 350 (2d Cir. 1928)	3
<i>Chemehuevi Tribe of Indians v. F.P.C.</i> , 429 U.S. 395 (1975)	6
<i>Jones v. Meeham</i> , 175 U.S. 1 (1899)	2
<i>Mitchel v. United States</i> , 9 Pet. 711 (1835)	2
<i>Rice v. Rehner</i> , 103 S.Ct. 3291 (1983)	4
<i>United States v. Candelaria</i> , 271 U.S. 432 (1926)	9
<i>United States v. Minnesota</i> , 466 F.Supp. 1382 (D. Minn. 1979) <i>aff'd sub nom Band of Chippewa In- dians v. Minnesota</i> , 614 F.2d 1161 (8th Cir.), <i>cert. denied</i> 449 U.S. 905 (1980)	4

TABLE OF AUTHORITIES—Continued

	Pages
<i>United States v. Oneida Nation of New York</i> , 477 F.2d 939 (Ct. Cl. 1973)	3
<i>Worcester v. Georgia</i> , 6 Pet. 515 (1832)	2
STATUTES AND REGULATIONS	
Act of July 22, 1790, Sec. 4, 1 Stat. 137	3
Act of March 1, 1793, Sec. 8, 1 Stat. 329	3
Act of May 19, 1796, Sec. 12, 1 Stat. 469	3
Act of March 3, 1799, Sec. 12, 1 Stat. 743	3
Act of March 30, 1802, Sec. 12, 2 Stat. 139	3
Act of May 10, 1926, 44 Stat. 498	6
Act of April 21, 1928, 45 Stat. 442, 25 U.S.C. § 322	6, 8
Pueblo Lands Act of June 7, 1924, 43 Stat. 636, Section 17	passim
25 U.S.C. §§ 323-328	4
1929 Regulations of the Department of the Interior Concerning Rights of Way Over Indian Lands	4, 8
LEGISLATIVE HISTORY	
H. Rep. No. 955, 69th Cong., 1st Sess. (1926)	6
S. Rep. No. 823, 80th Cong., 2d Sess. (1948), <i>re-printed in</i> 1984 U.S. Code Cong. and Ad. News	4
S. Rep. No. 94-148, 94th Cong., 1st Sess. (1975)	6
H. Rep. No. 94-800, 94th Cong., 2d Sess. (1976)	6
OTHER AUTHORITIES	
F. Cohen, <i>Handbook of Federal Indian Law</i> , (1942 ed.,) Univ. of N.M. Press Reprint	3

Petitioner, The Mountain States Telephone and Telegraph Company ("Mountain Bell"), respectfully submits this Reply Brief pursuant to Rule 22.5 of the Rules of the Supreme Court of the United States in order to address arguments first raised in the Respondent Pueblo of Santa Ana's Brief in Opposition to Petition for Writ of Certiorari ("Pueblo Br."). Specifically, Mountain Bell will address the Pueblo's erroneous contention that the right-of-way involved here is valid only if Section 17 contains affirmative language granting to the Secretary authority to approve the grant. Secondly, the new evidence attached as Appendices 1 and 2 to the Pueblo's Brief support the construction of Section 17 contemporaneously adopted by the Agency charged with administering Pueblo lands under the Pueblo Lands Act and ignored by the Tenth Circuit. For these reasons, a Writ of Certiorari should issue to review the decision of the Tenth Circuit Court of Appeals.¹

I. The Pueblo's Assertion That Congress Must Employ Affirmative Language When Authorizing the Secretary to Approve Pueblo Conveyances is Erroneous and Highlights the Conflict Between This Court's Interpretation of the Non-Intercourse Act and the Lower Court's Opinion.

The Pueblo asserts that Section 17 does not support the validity of the Pueblo's conveyance, because Section 17 "is entirely phrased in the negative[.]" (Pueblo Br.

¹ The Pueblo's contention that this Petition raises an "inconsequential question" regarding an "obsolete statute" (Pueblo Br. at 5, 1) is belied by the Pueblos of New Mexico having filed at least sixteen lawsuits against individuals, corporations and United States agencies concerning issues related to the Pueblo Lands Act. See Petition, Appendix F, 40-42.

at 17.) The Pueblo cites to no case which supports the proposition that Congress should have used "granting" language in a statute *recognizing* the sovereign power of alienation in an Indian tribe and restricting its exercise. *Mitchel v. United States*, 9 Pet. 711, 736-760 (1835); *Jones v. Meeham*, 175 U.S. 1, 9 (1899). In restricting a recognized power to act, one not granted by Congress but existing as a sovereign attribute, language of restriction is expected.

Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty have been limited from time to time by special treaties and laws designed to take from the Indian tribes control of matters which, in the judgment of Congress, these tribes could no longer be safely permitted to handle. The statutes of Congress, then, must be examined to determine the limitations of tribal sovereignty rather than to determine its sources or its positive content. What is not expressly limited remains within the domain of tribal sovereignty.

• • •

From the earliest years of the Republic the Indian tribes have been recognized as "distinct, independent, political communities," [*Worcester v. Georgia*, 6 Pet. 515, 559 (1832)] and, as such, qualified to exercise powers of self-government, not by virtue of any delegation of powers from the Federal Government, but rather by reason of their original tribal sovereignty. Thus treaties and statutes of Congress

have been looked to by the courts as limitations upon original tribal powers, or, at most, evidences of recognition of such powers, rather than as the direct source of tribal powers.

F. Cohen, *Handbook of Federal Indian Law*, p. 122, fn. 4 omitted, (1942 ed., Univ. of N.M. Press Reprint). See also, *United States v. Oneida Nation of New York*, 477 F.2d 939, 942 (Ct. Cl. 1973).

In drafting Section 17, Congress employed a statutory model consonant both with the recognition of tribal sovereignty and with Congressional restriction. It chose a model with which it was already familiar—the Non-Intercourse Act.² The Non-Intercourse Act did not contain granting language to Indian tribes authorizing or empowering them to convey property. They already had that power. Congress merely restricted it. In the Pueblo Lands Act, Congress conditioned the tribal exercise of its con-

² The second clause of Section 17 was obviously modeled after one of the earlier Non-Intercourse Acts (rather than the 1834 iteration) because it contains the phrase, "or any Pueblo Indian living in a community of Pueblo Indians." This would have paralleled the clause, "made by any Indians" or "from any Indian" which was found in the Non-Intercourse Acts of July 22, 1790, Section 4, 1 Stat. 137; Act of March 1, 1793, Section 8, 1 Stat. 329; Act of May 19, 1796, Section 12, 1 Stat. 469; Act of March 3, 1799, Section 12, 1 Stat. 743; Act of March 30, 1802, Section 12, 2 Stat. 139, but which is not found in the 1834 Act apparently because the system of allotments was taking shape by which individual Indians (of some tribes) would eventually have the power to convey. F. Cohen, *Handbook of Federal Indian Law*, *supra*, p. 326. Secretarial approval would obviously not validate a conveyance that was infirm on some substantive legal ground. *Barnett v. Equity Trust Co.*, 21 F.2d 325, 326, 332 (2d Cir. 1927), *app. dismissed, sub nom American Baptist Home Mission Soc. v. Barnett*, 26 F.2d 350 (2d Cir. 1928). A right-of-way grant from an individual Pueblo Indian would be invalid and thus the "absurd conclusion" feared by the Pueblo in this case (Pueblo Br. at 18-19, n. 8) would not result.

veyance power upon Secretarial approval. To ignore such a clear statutory parallel would be erroneous. The principles of liberal construction argued for by the Indians do not permit a court to ignore the clear wording of a treaty, agreement or enactment or to disregard the intent of Congress. *Rice v. Rehner*, 103 S.Ct. 3291, 3302 (1983). Courts are not empowered to remake history or expand treaties or legislation beyond their clear terms. *United States v. Minnesota*, 466 F.Supp. 1382, 1385 (D. Minn. 1979), *aff'd sub nom Red Lake Band of Chippewa Indians v. Minnesota*, 614 F.2d 1161 (8th Cir.), *cert. denied* 449 U.S. 905 (1980).

The language employed by Congress in this case recognized the power of the Pueblo to convey lands, but restricted that right and conditioned it upon Secretarial approval. This was in accord with the practice in existence at the time the Pueblo Lands Act was passed (Petition at 16) and comported "with the conditions of the Pueblo Indians" (Pueblo Br. at App. 2, 12).³

³ The Department of the Interior did not employ this procedure with the Pueblos exclusively but viewed it as a means of securing rights-of-way across lands of any tribe. In introducing legislation that became the 1948 General Purpose Rights-of-Way Act, 25 U.S.C. §§ 323-328 (1982), Under Secretary of the Interior, Oscar L. Chapman, wrote to Arthur H. Vandenberg, President *pro tempore* of the Senate.

When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often the case, the right must then be obtained by means of easement-deeds executed by the Indian owners and approved by the Secretary of the Interior.

S. Rep. No. 823, 80th Cong., 2d Sess. 3-4 (1948), *reprinted in* 1948 U.S. Code Cong. & Ad. News 1033, 1036. Thus, the administrative practice was comparable to that applicable to other tribes.

II. Appendices 1 and 2 of the Brief in Opposition Support the Agency Construction of the Act and Contradict the Tenth Circuit Holding.

The Pueblo has attached as Appendices 1 and 2 to its Brief two letters which were not included in the record before the lower courts. The Pueblo claims that these letters support its position that the right-of-way involved in this lawsuit is invalid. Assuming for purposes of this Reply Brief that the Court will consider such documents, Mountain Bell believes that the documents attached to the Pueblo's Brief are not helpful to the Pueblo's arguments and, in fact, support Mountain Bell's position.

The first document attached is a letter from George A. H. Fraser, Special Assistant to the Attorney General, who represented the United States in some Pueblo Lands Act cases. The Pueblo interprets this letter as evidence that Mr. Fraser adopted the interpretation urged by Mountain Bell only to avoid financial difficulty and public embarrassment for various railroads and utilities. (Pueblo Br. at 9.)

The Pueblo maintains, without citation, that the construction of Section 17 adopted by the Department of the Interior "originated with Chicago bond lawyer, Melvin Hawley," (Pueblo Br. at 9). In fact, the document attached as Appendix 1 (Pueblo Br. at App. 1, 1-11), reveals that representatives of the Department of the Interior, the Pueblos, and those seeking rights-of-way across Pueblo lands agreed that Section 17 "presents one of the numerous puzzles offered by the Act [,]"⁴ and concluded

⁴ This, of course, controverts the Tenth Circuit's Decision that the language of Section 17, being joined by a conjunctive,

(Continued on following page)

that the construction of the second half of Section 17 allowing voluntary conveyances with Secretarial approval was "reasonable."

The letter attached by the Pueblo was written by Mr. Fraser to the Attorney General in February of 1926. Later that year, the Pueblo of Santa Ana and the Pueblo of Zia granted to the railroad a right-of-way under Section 17, but the Pueblo of Jemez refused. Because the Jemez Pueblo had "persistently refused to make a contract," it was determined that there was no adequate remedy to secure for the railroad a right-of-way short of a bill authorizing condemnation proceedings. Act of May 10, 1926, 44 Stat. 498. H. Rep. No. 955, 69th Cong., 1st Sess. (1926). *See also*, H. Rep. No. 94-800, 94th Cong., 2d Sess. (1976) and S. Rep. No. 94-148, 94th Cong., 1st Sess. (1975).

Mr. Fraser did not consider condemnation as a permanent cure for the Pueblo right-of-way problem. Rather, he advocated that the existing right-of-way statutes be made applicable to the Pueblos. H. Rep. No. 955, 69th Cong., 1st Sess. (1926). Such act was not taken by Congress until April 21, 1928, 45 Stat. 442, 25 U.S.C. § 322. Prior to that Congressional enactment, on January 4, 1927, Mr. Fraser wrote to Mountain Bell attorneys and inquired into their intentions regarding a right-of-way across the Pueblo of Taos (App. 1-2). In that letter, he makes reference to the 1926 condemnation legislation and concludes by stating "The Pueblo Lands Act of June 7, 1924 . . . also provides in section 17 a method whereby

(Continued from previous page)

meant "exactly what it says [,]" (Petition at App. A, 8) and was not ambiguous. However, even if the language was unambiguous, the Tenth Circuit erred in failing to defer to the undisputed construction placed upon that Section by the Agency charged with its administration. *Chemehuevi Tribe of Indians v. F.P.C.*, 420 U.S. 395, 403-404, 409-410 (1975).

titles may be procured from the Pueblo Indians with the assent of the Secretary of the Interior. In my judgment, these are the only two ways whereby a good title can now be obtained." (App. 2).

Thus, by 1927, if Mr. Fraser had had any doubts regarding the use of Section 17 as authority for rights-of-way across Pueblo lands when approved by the Secretary of the Interior, they had undisputedly disappeared. Mr. Fraser was affirmatively communicating his reasonable interpretation to utilities as being one of "only two ways a good title" could be obtained. Certainly, a right-of-way negotiated with the Pueblos was more beneficial to them than condemnation.

The fact that, after the passage of the 1928 Act, Section 17 was used only occasionally does not refute that the administrative practice under it was obviously thought out, was contemporaneous, was concurred in by the Pueblos through their counsel, was endorsed by numerous parties, and was communicated to the Attorney General and to third parties. The fact that it was used only occasionally after 1928 does not dispute, as the Pueblo attempts to do (Pueblo Br. at 21-22), the established construction given it by the Agency when it was in use.

After 1928, the Pueblo Indians were treated basically the same as other Indian Tribes for purposes of right-of-way grants. As Mr. Fraser's letter to the Attorney General makes clear, one of the reasons for using Section 17 was so that the Pueblo Indians would not be in a favored position over other Indians and would not be able to prevent utilities from crossing their grants. (Pueblo Br. at App. 1, 4-5.) The construction adopted by the Agency permitted such beneficial uses and without it no

utility could have gotten a right-of-way grant across Pueblo lands between 1924 and 1926; and between 1926 and 1928, rights-of-way could have only been secured by condemnation.

The Pueblo's professed dilemma (Pueblo Br. at 16-17) as to the effect of the Act of April 21, 1928 on Section 17 is resolved by the Administrative practice occurring at the time of the 1928 Act. The 1926 condemnation legislation was passed because the Jamez Pueblo would not contract for a right-of-way. The 1928 Act was passed because the 1926 condemnation Act was found to be unconstitutional. Congress acted to apply previously existing right-of-way statutes across Indian lands to the Pueblo in a historical context where the Pueblos would not consent to the grants of right-of-way.⁵ Therefore, while the 1928 Act, and the regulations promulgated thereunder, addressed problems inherent in a Pueblo withholding its consent, Section 17 of the Pueblo Lands Act provided an alternative method of acquiring a right-of-way if Pueblo consent was obtainable.

The second letter attached as Appendix 2 (Pueblo Br. at App. 12-14) is also not helpful to the Pueblo's case. That letter was written by Francis Wilson, who the Pueblo claims drafted Section 17, and states that Section 17 "is intended to cover the same ground as Section 2116 of the Revised Statutes but *it is changed so as to accord with*

⁵ Regulations adopted by the Department of the Interior in 1929 specifically provided that "the approval of the Secretary of Interior [to right of way applications], may be given in his discretion, even though no amicable settlement has been reached with the Indians." 1929 Regulations of the Department of the Interior Concerning Rights of Way Over Indian Lands, ¶ 79.

the conditions of the Pueblo Indians." (Pueblo Br. at App. 12.) The emphasized language supports the interpretation that the Pueblo, historically possessing authority to grant property interests with governmental approval, *United States v. Candelaria*, 271 U.S. 432 (1926), would be allowed to exercise that authority under the supervision of the Secretary of Interior.

The Brief in Opposition, even with its attached Appendices, has failed to refute that the administrative practice of the Interior Department under Section 17 was a reasonable one and that the Pueblos had the authority under that section to grant rights-of-way with Secretarial approval.

III. CONCLUSION

For the foregoing reasons, Mountain Bell prays that a Writ of Certiorari be issued to review the judgment of the opinion of the United States Court of Appeals for the 10th Circuit.

Respectfully submitted this 26 day of September, 1984.

KATHRYN MARIE KRAUSE, Esq.
(Counsel of Record)
MARY C. SNOW, Esq.
931 14th Street, Room 1300
Denver, Colorado 80202
(303) 624-2200

Attorneys for Petitioner

App. 1

APPENDIX

DEPARTMENT OF JUSTICE

Santa Fe, N.M., Jan. 4, 1927.
c/o Pueblo Lands Board.

Messrs. Smith & Brock, Att'ys,
for the Mountain States Tel. & Tel. Co.,
Denver, Colorado

In re: Telephone lines on the
Pueblo of Taos,
Taos County, New Mexico.

Dear Sirs:

In my capacity as attorney for the United States with instructions to bring suit to quiet title to effectuate the decisions of the Pueblo Lands Board on Pueblo titles in New Mexico, I write to inquire the facts with regard to your two telephone lines crossing the Pueblo of Taos. My information, which is very meagre, is to the effect that your main line now enters the Pueblo grant from the south, and after proceeding northerly for some distance, thence progresses in an easterly and westerly direction across the main grant and also across the Tenorio tract, which also belongs to the Pueblo. Further, I understand that you own, or operate, an earlier line, originally constructed by, or for, Dr. Thomas Martin, of Taos, the exact location of which I do not know.

The Board probably sometime during the present month will file its report on this Pueblo determining which titles of settlers or other intruders on the grant are valid and which invalid. Among these titles will be yours to these two telephone lines. I have heard that you took some steps to legitimate your title to the new main line, but cannot learn here exactly what you did. A some-

App. 2

what similar situation arose on the Pueblo of Jemez with regard to a railway there which supposed that it had acquired a satisfactory title under the Act of March 2, 1899, 30 Stat. 990, as amended, 36 Stat. 859, U.S. Compiled Statutes, Sec. 4181, et seq. I made up my mind that no title could be obtained to any portion of the Pueblo Indian grants under these statutes, and was therefore forced to bring suit to quiet title against this railway. One result of this was that in 1926 a statute was passed permitting the condemnation of Pueblo Indian lands in New Mexico. The Pueblo Lands Act of June 7, 1924, 43 Stat. 331, also provides in section 17 a method whereby titles may be procured from the Pueblo Indians with the assent of the Secretary of the Interior. In my judgment these are the only two ways whereby a good title can now be obtained.

I have, of course, no hostile feeling towards your Company, but it is necessary that this question of title shall be cleared up, and with that end in view I would be greatly obliged if you would let me know exactly what the present status of your right is to the two lines above mentioned and any other telephone line, if such there is, on the Taos Pueblo grant.

Please address me "c/o Pueblo Lands Board, Santa Fe, New Mexico."

With kindest personal regards, I am,

Very sincerely yours,

/s/ GEORGE A. H. FRASER

Special Assistant to
the Attorney General

GAHF-S

NOV 21 1984

ALEXANDER L. STEVAS,
CLERK

6
No. 84-262

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH CO.,
Petitioner,
VS.
PUEBLO OF SANTA ANA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit.

**BRIEF OF AMICI CURIAE CITY OF ESCONDIDO,
ESCONDIDO MUTUAL WATER COMPANY, AND
VISTA IRRIGATION DISTRICT IN
SUPPORT OF PETITIONER**

PAUL D. ENGSTRAND,
DONALD R. LINCOLN,
Counsel of Record,
HENRY E. HEATER
JENNINGS, ENGSTRAND &
HENRIKSON,
A Professional Law Corporation
2255 Camino del Rio South,
San Diego, Calif. 92108,
(619) 291-0840,
*Attorneys for Amici Curiae
City of Escondido and
Escondido Mutual Water
Company.*

JOHN R. SCHELL,
KENT H. FOSTER,
Counsel of Record,
GLENN, WRIGHT, JACOBS &
SCHELL,
A Professional Corporation
2320 Fifth Avenue, Suite 300,
San Diego, Calif. 92101,
(619) 239-1211,
*Attorneys for Amicus Curiae
Vista Irrigation District.*

TABLE OF CONTENTS

	<u>Page</u>
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I	
THE COURT SHOULD GIVE BINDING EFFECT TO THE 1928 AGREEMENT	4
A. The Secretary Of The Interior Had The Power To Bind The Indians By The 1928 Agreement.....	4
B. There Is A Strong Public Policy Favoring Certainty In The Settlement Of Property Disputes	8
II	
MOUNTAIN BELL WAS NOT A TRESPASSER BECAUSE IT WAS ON THE INDIAN LANDS WITH CONSENT.....	10
A. Consent Is A Defense to Trespass	11
B. The Indians had the Power To Consent to The Use Of Their Land	12
C. One Who Occupies Indian Land With Their Consent Is Not A Trespasser	14
III	
THE INDIAN CLAIMS ARE STALE AND INEQUITABLE AND SHOULD BE BARRED	18
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Arizona v. California, 373 U.S. 546 (1963)	8
Arizona v. California, 460 U.S. 605, 75 L.Ed.2d 318 (1983)	9
Barker v. Harvey, 181 U.S. 481 (1901)	8
Bowe v. Immigration & Naturalization Service, 597 F.2d 1158 (9th Cir. 1979)	6
County of Oneida v. Oneida Indian Nation, U.S. Docket Nos. 83-1065, 83-1240	18
Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, _____ U.S. _____, 80 L.Ed.2d 753 (1984)	2
Federal Power Comm'n v. Tuscarora Indian Nation, 362 U.S. 99 (1960)	20
Heckman v. United States, 224 U.S. 413 (1912)	10
Kansas & New Mexico Land and Cattle Co. v. Thompson, 57 Kan. 792, 48 Pac. 34 (1897)	14
Le Vick v. Skaggs Cos., Inc., 701 F.2d 777 (9th Cir. 1983)	6
Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982)	12
Montana v. United States, 450 U.S. 544 (1981)	13
Nevada v. United States, 463 U.S. 110, 77 L.Ed.2d 509 (1983)	7, 8, 9
Organized Village of Kake v. Egan, 369 U.S. 60 (1962)	6, 7
Rincon Band, et al. v. Escondido Mutual Water Co., et al., Civ. Nos. 69-1217-S, 72-271-S and 72-276-S, S.D. Cal.	1, 2

TABLE OF AUTHORITIES

	Page
Rincon, et al. Bands of Indians v. United States, Cl. Ct., Docket 80-A	2
United States v. Ahtanum Irrigation Dist., 236 F.2d 321 (9th Cir. 1956), cert. denied, 352 U.S. 988 (1957) (Ahtanum I)	4, 5, 7, 10
United States v. Ahtanum Irrigation Dist., 330 F.2d 897 (9th Cir. 1964), cert. denied, 381 U.S. 924 (1965) (Ahtanum II)	6, 7, 10
United States v. Brown, Equity No. 1814, D. N.M.	16
United States v. Hunter, 21 Fed. 615 (C.C.E.D. Mo. 1884)	15
United States v. Southern Pacific Transp. Co., 543 F.2d 676 (9th Cir. 1976)	15, 16
United States v. Title Ins. Co., 265 U.S. 472 (1924)	8
United States v. Truckee Carson Irrigation Dist., 649 F.2d 1286 (9th Cir. 1981)	6, 7

Rule

Rules of the Supreme Court of the United States, Rule 36.2	1
--	---

Federal Statutes

Act of June 7, 1924, 43 Stat. 636 (Pueblo Lands Act)	3, 4, 8, 17
25 U.S.C. § 2	4, 5, 6
25 U.S.C. § 9	7
25 U.S.C. § 81	14
25 U.S.C. § 177	14, 15, 16
25 U.S.C. § 179	15

TABLE OF AUTHORITIES

	<u>Page</u>
25 U.S.C. § 312	16
43 U.S.C. §§ 934-39	16
43 U.S.C. § 946	2
43 U.S.C. § 1457	4, 5, 7
Miscellaneous	
F. Cohen, Handbook of Federal Indian Law (1942)	12
W. Prosser, Law of Torts (4th Ed. 1978)	11
Relation of Pueblos to their Members, the Federal Government, The State and Others, Opinion M- 29566, 1 Op. Solicitor of Interior 913 (1939)	13
Restatement of Property (1944)	16
Restatement (2d) Torts (1965)	11, 15
1A G. Thompson, Real Property (1964 Replace- ment)	11, 12, 16
Tule River Council Permission to California For- estry Division to Construct Fire Protection Road Across Reservation, 1 Op. Solicitor of Interior 938 (1939)	15

No. 84-262

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OCTOBER TERM, 1984

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH CO.,*Petitioner,*

VS.

PUEBLO OF SANTA ANA,

*Respondent.*On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit.BRIEF OF AMICI CURIAE CITY OF ESCONDIDO,
ESCONDIDO MUTUAL WATER COMPANY, AND
VISTA IRRIGATION DISTRICT IN
SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amici are the City of Escondido, Escondido Mutual Water Company and Vista Irrigation District. This brief is in support of Petitioner Mountain States Telephone and Telegraph Company ("Mountain Bell").¹

Amici are defendants in a consolidated action brought by five Mission Indian Bands and the United States on behalf of the Bands: *Rincon Band, et al. v. Escondido*

¹Pursuant to Rule 36.2, Amici have filed letters of consent from both parties with the Clerk of this Court.

Mutual Water Co., et al., Civ. Nos. 69-217-S, 72-271-S and 72-276-S, S.D. Cal. The Bands and the United States seek to void certain water and right-of-way contracts and permits, and request declaratory and injunctive relief in addition to millions of dollars in damages for alleged breaches of contract, trespasses and wrongful diversion of Indian water dating from 1895.²

Certain dispositive issues in that case are similar to ones raised in this case:

1. Whether the Indians should be bound by the Secretary of the Interior's approval of an agreement which resolved disputed Indian property rights;³

2. Whether a party can be held liable in trespass during the period it occupied Indian lands with the consent of both the Indians and the Secretary of the Interior.⁴

²The controversy is being waged in two additional fora: (1) *Rincon, et al. Bands of Indians v. United States*, Claims Court Docket 80-A (suit seeking damages for violation of Indian water rights); and (2) *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians* — U.S. —, 80 L.Ed.2d (1984) (dispute over Federal Energy Regulatory Commission's jurisdiction to license federal power project which crosses Indian lands).

³On January 10, 1980, the District Court in Amici's case ruled that contracts entered into in 1914 and 1922 by the Secretary of the Interior on behalf of the Indians were void to the extent that they purported to alienate, convey or limit Indian land and water rights. The Court also ruled that a canal right-of-way permit issued by the Secretary of the Interior pursuant to 43 U.S.C. section 946 was invalid.

⁴On December 10, 1980, the District Court ruled that in light of its earlier rulings, the occupation of one of the reservations by Amicus Escondido Mutual Water Company's canal was a trespass.

3. Whether the Indians' claims are barred by statutes of limitations, estoppel, laches, and other equitable doctrines.⁵

SUMMARY OF ARGUMENT

Amici agree with Mountain Bell that the Tenth Circuit misconstrued section 17 of the Pueblo Lands Act, Act of June 7, 1924, 43 Stat. 63, and failed to give proper res judicata effect to the 1928 district court dismissal; however, they also believe that the 1928 contract is itself an independent bar to this action. The Secretary of the Interior has broad statutory supervisory and management powers over Indians and their property. Those powers authorized the Secretary to approve the 1928 contract as a peaceful settlement of the property dispute between Mountain Bell and the Pueblo. The strong public policy favoring certainty of title to property precludes the Indians from reopening the dispute.

Even if the 1928 contract did not give Mountain Bell a valid right-of-way, Mountain Bell nevertheless was not a trespasser. An essential element of the tort of trespass is lack of consent. By virtue of the 1928 contract, Mountain Bell had the consent of both the Indians and the Secretary of the Interior to occupy the Indian land.

Moreover, the Indians' fifty-year delay in bringing these claims is patently unreasonable. The Court should bar such Indian claims by applying the applicable state statutes of limitations or equitable doctrines such as laches.

⁵On January 9, 1980, the District Court in Amici's case granted partial summary judgment ruling that "The affirmative defenses of estoppel, laches, waiver, federal and state statutes of limitations, adverse possession, prescription and acquiescence . . . are insufficient as a matter of law."

ARGUMENT

I

THE COURT SHOULD GIVE BINDING EFFECT TO THE 1928 AGREEMENT

By narrowly focusing on the meaning and effect to be given to the Pueblo Lands Act and the technical rules of *res judicata*, both the District Court and the Tenth Circuit failed to give proper weight and effect to the Secretary of the Interior's approval of the 1928 contract.⁶ Aside from any effect the 1928 Court dismissal had, the Secretary's approval of the 1928 contract is an independent bar to the Pueblo's action in this case.

A. The Secretary Of The Interior Had The Power To Bind The Indians By The 1928 Agreement.

In 43 U.S.C. section 1457, the Secretary of the Interior is charged "with the supervision of public business relating to . . . Indians." Similarly, 25 U.S.C. section 2, charges the Commissioner of Indian Affairs under the direction of the Secretary of the Interior with "the management of all Indian affairs and . . . all matters arising out of Indian relations." These statutory powers authorized the Secretary to approve the 1928 agreement as a peaceful means of resolving the dispute over Mountain Bell's use of the Pueblo's land.

In *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957) (Ahtanum I) the United States sued on behalf of the Yakima tribe of Indians to quiet title to the Indians' right to use the water of Ahtanum Creek. The dispositive issue was the validity and effect of a 1908 agreement which had

⁶Amici believe that this Court never has held an Indian agreement void which was also approved by the Secretary of the Interior.

allocated Indian and non-Indian water rights.⁷ 236 F.2d at 328.

The Ninth Circuit affirmed the District Court, ruling that the 1908 agreement was valid. The Court discussed 43 U.S.C. section 1457 and 25 U.S.C. section 2 and stated:

It is fair to say that in conferring these powers upon the Secretary of the Interior Congress must have had it in mind that a part of the Secretary's task of supervision and of management of Indian affairs would necessarily deal with certain relations between the Indians on the one hand and their white neighbors on the other. The management of any parcel of land necessarily involves some degree of occasional adjustment of the rights of the owner in relation to and concerning adjoining landowners; arrangements for the location and erection of boundary fences, and repair and maintenance of those fences are illustrations of this.

Id. at 335.

The Court concluded:

"we are constrained to hold that since some arrangement for the apportionment of the Ahtanum waters was the sort of thing which the Secretary was authorized to do by the grant of general powers of supervision and management, he therefore had the power to make the 1908 agreement."

Id. at 338.

⁷In 1906, a non-Indian had sued in state court to enjoin certain defendants from diverting water from Ahtanum Creek. One defendant was the Indian Irrigation Service Engineer (Redman) who was enlarging the irrigation ditches on the reservation. *Id.* at 328-29. In 1908, the Chief Engineer of the Indian Irrigation Service, acting on behalf of the United States, negotiated a compromise agreement which allocated the water between the Indians and the non-Indians. *Id.* at 329. On June 30, 1908, the agreement was approved by the First Assistant Secretary of the Interior and the suit against Redman was dismissed. *Id.* at 329-30.

When the case subsequently returned to the Ninth Circuit, *United States v. Ahtanum Irrigation Dist.*, 330 F.2d 897 (9th Cir. 1964), *cert. denied*, 381 U.S. 924 (1965), (*Ahtanum II*) the Court reaffirmed the validity of the 1908 agreement:

We upheld the validity of the agreement, basing our determination in that regard upon our construction of the agreement itself, and our determination that the white landowners may have acquired some rights in the waters of the stream. Dealing with the contention of the United States that the Secretary of the Interior was without power to make such an agreement, we held that the Secretary in making it was undertaking to deal with certain relations between the Indians on the one hand and their white neighbors on the other.

Id. at 899-900.

In *United States v. Truckee Carson Irrigation Dist.*, 649 F.2d 1286, 1300 n.10 (9th Cir. 1981), a three-judge panel of the Ninth Circuit stated that the United States Supreme Court in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) had "modified"⁸ the *Ahtanum* rules.⁹

⁸A three-judge panel cannot reverse controlling authority without convening an *en banc* panel. See *Bowe v. Immigration & Naturalization Serv.*, 597 F.2d 1158, 1159 n.1 (9th Cir. 1979). A three-judge panel, however, may reexamine existing precedent in light of intervening United States Supreme Court cases (*Le Vick v. Skaggs Cos., Inc.*, 701 F.2d 777, 778 (9th Cir. 1983)), and that is what the Ninth Circuit panel strained to do.

⁹In *Kake*, an issue was whether Interior had the power to promulgate regulations permitting off-reservation fishing in derogation of state law. The Court concluded "there is no statutory authority under which the Secretary of the Interior might permit either [tribe] to operate fish traps contrary to state law." 369 U.S. at 62. This Court did state that in *Interior's* opinion the sole authority conferred by 25 U.S.C. sections 2

In *Nevada v. United States*, 463 U.S. 110, 77 L.Ed.2d 509 (1983), this Court reversed *Truckee-Carson* on other grounds, holding that a 1944 Court decree incorporating a settlement agreement was *res judicata*. Because of that disposition the Court did not need to address the issue of whether, pursuant to his general supervisory and management powers, the Secretary of the Interior had the authority "to negotiate and execute an out-of-court settlement of disputed Indian . . . rights . . . [which] settlement agreement . . . provide[d] an independent bar to the Tribe's attempt to relitigate the [issue]." 77 L.Ed.2d at 533 n.16.

That issue is now presented. As pointed out in *Ahtanum I and II*, *supra*, Congress clearly envisioned that the

and 9 [25 U.S.C. section 9 empowers the President to prescribe regulations for carrying into effect acts relating to Indian affairs] was to implement specific laws and govern relations between the United States and Indians — "not a general power to make rules governing Indian conduct." 369 U.S. at 63. The Court itself, however, stated only that: "We agree that [the statutes] do not support the fish-trap regulations." *Ibid.*

In *Truckee-Carson* the Ninth Circuit misinterpreting *Kake* stated that Interior's general supervisory and management powers could only be exercised in the implementation of specific laws. It reached that remarkable conclusion even though: (1) *Kake* did not mention *Ahtanum I*; (2) *Kake* neither mentioned nor discussed 43 U.S.C. section 1457, a statute relied on in *Ahtanum* which gives the Secretary of the Interior broad management powers over Indians and their lands; (3) *Kake* construed Interior's regulation-making power under 25 U.S.C. section 9, a statute that was not at issue in *Ahtanum*; (4) In *Kake*, there were no prior agreements or judgments involved, thus this Court did not address the issue of whether the Secretary could make a binding agreement respecting Indian property rights; and, (5) *Kake* was not mentioned in *Ahtanum II* decided two years later.

The Ninth Circuit panel's construction of the Secretary's general powers in *Truckee-Carson* leads to the contradictory conclusion that the Secretary has no general powers, but only those powers that are ancillary to various, specific statutes.

Secretary's role of supervising and managing Indian affairs would include adjusting property rights among Indians and their neighbors. Under the circumstances Amici submit that approval of the 1928 agreement was well within the Secretary's powers (even independent of section 17 of the Pueblo Lands Act) and that this approval itself constitutes an independent bar to the Indians' action.¹⁰

B. There Is A Strong Public Policy Favoring Certainty In The Settlement Of Property Disputes

One consistent, overriding theme that recurs in this Court's decisions respecting Indian property rights is the need for certainty in resolving disputes over such rights.

In *United States v. Title Ins. Co.*, 265 U.S. 472 (1924), this Court rejected an attempt by the United States to reopen a dispute over Indian property rights that had been settled twenty-three years earlier in *Barker v. Harvey*, 181 U.S. 481 (1901). The Court stated:

"Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered open. Such decisions become rules of property and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective, and may affect titles

¹⁰This Court has frequently emphasized the important and often strategic role which Congress intended the Secretary to play in the development of the water and land policies of the West. See, e.g., *Arizona v. California*, 373 U.S. 546, 546 (1963) (Secretary's role in contracts for the delivery of Colorado River water); *Nevada v. United States*, 463 U.S. 110, 77 L.Ed.2d 509, 523 (1983) (Secretary's obligations with respect to the reclamation of arid lands).

purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change."

265 U.S. at 486-87.

In *Arizona v. California*, 460 U.S. 605, 75 L.Ed.2d 318 (1983), this Court rejected an attempt by both the Indians and the United States to alter a 1964 decree which allocated certain water rights to the Indians. The Court stated:

Abraham Lincoln once described with scorn those who sat in the basements of courthouses combing property records to upset established titles. Our reports are replete with reaffirmations that questions affecting titles to land, once decided, should no longer be considered open.

75 L.Ed.2d at 334.

Most recently, in *Nevada v. United States*, 463 U.S. 110, 77 L.Ed.2d 509 (1983), this Court rejected an attempt by an Indian tribe and the United States to repudiate a settlement agreement allocating Indian water rights that had been incorporated in a 1944 court decree. The Court held that res judicata principles bound the Indians even though the United States had acted unilaterally without notice to them and the United States simultaneously had represented conflicting interests. (77 L.Ed.2d at 523). Once again the Court emphasized the need for certainty in cases concerning real property (*Id.* at 524 and n.10).

What emerges from the preceding Court decisions is a clear affirmance of substance over form. The rigid technical requirements of res judicata should not be allowed to permit the reopening of a long-settled property dispute. The issue should not be decided on such niceties as, for example, in this case, whether a court dismissal was with

or without prejudice. The heart of the matter is not the court decree; it is the settlement of the dispute which has received the imprimatur of the Secretary of the Interior acting on behalf of the Indians, either solely or in concert with them.

In other words, does the Secretary of the Interior have the power to bind the Indians by approving contracts settling disputed Indian property rights? The *Ahtanum* cases say yes. Public policy considerations also compel an affirmative answer.

No one denies the United States' power to bind the Indians by suing on their behalf to establish their property rights. That power is not tied to any particular statute, but inheres in its role as trustee. See *Heckman v. United States*, 224 U.S. 413, 444-46 (1912). Certainly that power must include the lesser power through the Secretary of the Interior to reach out-of-court settlements respecting disputed Indian property rights. A contrary conclusion creates the anathema of litigation being preferred to peaceful settlement.

II

MOUNTAIN BELL WAS NOT A TRESPASSER BECAUSE IT WAS ON THE INDIAN LANDS WITH CONSENT

Although asked merely to construe the validity and effect of the 1928 contract and Court dismissal, both the District Court and the Tenth Circuit went further and essentially held that Mountain Bell was a trespasser and that "[t]he Pueblo shall recover damage from April 13, 1978 to the date the defendant's telephone and telegraph line was removed." (JA 94, 107) These rulings are erroneous because they ignore the fact that Mountain Bell

had both the Indians' and the Secretary's consent to use the Pueblo's lands.

The use of another's property with his consent is not actionable as trespass. Here, the Indians had the power to consent, and did consent to the use of their property by Mountain Bell. The Secretary of the Interior also consented to Mountain Bell's use of the Indian property. Under the circumstances, even if Mountain Bell's contract was for any reason ineffective to convey it any property interest, it was not a trespasser.

A. Consent Is A Defense To Trespass.

As Professor Prosser has noted:

The consent of the person damaged will ordinarily avoid liability for intentional interference with person or property. It is not, strictly speaking, a privilege, or even a defense, but goes to negative existence of any tort in the first instance. It is a fundamental principle of the common law that *volenti non fit injuria* — to one who is willing, no wrong is done "The absence of lawful consent," said Mr. Justice Holmes, "is part of the definition of an assault." The same is true of . . . trespass.

W. Prosser, *Law of Torts* § 18 at 101 (4th ed. 1978).

One who has consent to be on another's land is at the minimum a licensee and thus immune from trespass. See 1A G. Thompson, *Real Property* § 216 at 192-93 (1964 Replacement); Prosser, *supra* § 60 at 376; accord Restatement (Second), *Torts*, § 167 (1965). In this case, the 1928 consent of the Indians and the Secretary of the Interior negates the very existence of the tort of trespass.

Once such a privilege has been granted it exists until revoked by the licensor. Thompson, *supra* § 216 at 194.

Here there was no revocation until this action was instituted in 1980. Prior to that date, Mountain Bell had a license to use the Indian lands and therefore was not a trespasser.

B. The Indians Had The Power To Consent To The Use Of Their Land.

Even if the Pueblo lacked the authority to grant Mountain Bell an easement or other property interest, it nevertheless had the power to *consent* to Mountain Bell's entry on and use of its land. According to Professor Cohen:

That an Indian tribe may grant permission to third parties to enter upon tribal land, and may impose such conditions as it deems desirable upon such permission, is a proposition that has been repeatedly affirmed by the Attorney General Under the foregoing analysis the power of a tribe "to declare who shall come within the boundaries of its occupancy and under what regulations and conditions" exists in the absence of treaty or statute as an inherent power of the tribe.

F. Cohen, *Handbook of Federal Indian Law* 332 (1942).

Consistent with Professor Cohen's view, this Court consistently has held that one attribute of Indian sovereignty is the tribe's power to exclude non-Indians from tribal land or consent to their entry under such conditions as the tribe might prescribe. In *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982), the Court stated:

Nonmembers who lawfully enter tribal lands remain subject to the tribe's *power* to exclude them. This power necessarily includes the lesser power to place conditions on entry, on continued presence, or on reservation conduct When a tribe grants a non-Indian the right to be on Indian land, the tribe agrees not to exercise its *ultimate* power to oust the non-Indian as

long as the non-Indian complies with the initial conditions of entry.

See also *Montana v. United States*, 450 U.S. 544, 557 (1981) (A "[t]ribe may prohibit non-members from hunting or fishing on land belonging to the tribe or held by the United States in trust for the Tribe, . . . [and] if the Tribe permits non-members to fish or hunt on such lands, it may condition their entry . . .").

In "Relation of Pueblos to Their Members, The Federal Government, the State, and Others" Opinion M-29566, 1 Op. Solicitor of Interior 913 (1939), the Solicitor discussed the legal relationship between the Indian pueblos of New Mexico and Arizona and third parties, and stated:

As a legal owner or as an equitable owner the pueblo has all the ordinary rights of a landowner with respect to third parties except the right of alienation. The pueblo has the right to exclude third parties from its land, and it has the right to qualify this exclusion by specific conditions under which third parties will be permitted to enter upon pueblo lands. As a landowner the pueblo may insist that its licensees pay a sum of money for the privilege of entering the pueblo lands, and that while they are within the pueblo boundaries they refrain from certain types of conduct which the pueblo authorities classify as offensive. As a landowner the pueblo may grant revocable rights of occupancy, grazing permits, or other licenses to nonmembers, provided that no property interest is thereby alienated, and subject to the approval of the Interior Department where such approval is required by existing law.

Id. at 928.

C. One Who Occupies Indian Land With Their Consent Is Not A Trespasser.

In *Kansas & New Mexico Land and Cattle Co. v. Thompson*, 57 Kan. 792, 48 Pac. 34 (1897), the Cherokee Strip Livestock Association and Thompson sued the Kansas & New Mexico Land and Cattle Company to recover damages on a contract for pasturing cattle on Indian land that was in Thompson's possession.

The primary contention was that the contract between the parties was illegal — that Thompson did not have a valid lease of the Indian land. The trial court held that plaintiffs "could recover as upon a *quantum meruit* for the reasonable value of the pasturage and . . . services in caring for the cattle." (*Id.* at 797)

On appeal, the Kansas Supreme Court affirmed, stating:

"Though Thompson may not have had a valid lease of the large tract of land in his possession, it does not appear from the record that he was violating any law in taking cattle to pasture thereon . . . It nowhere appears in the record in this case that Thompson was in possession of this land, or took these cattle there, without the consent of the tribe. The argument in the brief of the plaintiff in error is to the effect that the written contract between the parties was invalid under sections 2103 [25 U.S.C. § 81] and 2116 [25 U.S.C. § 177] of the Revised Statutes of the United States, which declare grants and leases of Indian lands of no validity unless made in accordance with a treaty or convention entered into pursuant to the Constitution. It may be conceded that, under these sections, whatever lease Thompson had was void, yet it does not necessarily follow that he violated any law, or subjected himself to any penalty, by taking cattle there to graze, if done with the consent to the Indians."

Id. at 796-97

In *United States v. Hunter*, 21 Fed. 615 (C.C.E.D. Mo. 1884), the Court used similar reasoning in deciding that a purported five-year grazing lease did not violate 25 U.S.C. section 177. The Court referred to 25 U.S.C. section 179 which imposed a penalty on persons who grazed their cattle on Indian land without Indian consent. It reasoned that "[t]his implies that an Indian tribe may consent to the use of their lands for grazing purposes, or at least, that if it does consent no penalty attaches; and, if the tribe may so consent, it may express such consent in writing, and for any brief and reasonable time." (*Id.* at 617-18)

See also "Tule River Council Permission to California Forestry Division to Construct Fire Protection Road Across Reservation," 1 Op. Solicitor of Interior 938 (1939) (interpreting an "easement" to reconstruct and maintain a fire protection road across an Indian reservation as instead being a naked permit or license and therefore legal).

The only contrary authority is *United States v. Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976). There the Court, reversing the trial court, ruled that a railroad was a trespasser on Indian land despite an 1882 agreement by the tribe which granted the railroad a right-of-way. A major distinguishing fact is that the 1882 agreement "was expressly made subject to final ratification by Congress . . . [but] Congress never ratified the agreement." (*Id.* at 681)¹¹

¹¹The Indians thus conditioned their consent on Congressional ratification. Once a reasonable time had passed and that ratification had not been obtained, the consent was revoked. See Restatement (Second), Torts, *supra*, § 170 and Comment c.

The Court also appeared concerned that if it held that the 1882 or later unsuccessful attempts¹² to obtain rights-of-way created a license, it would undermine the purpose of 25 U.S.C. section 177 (*Id.* at 697-99).

What the Ninth Circuit failed to recognize is that 25 U.S.C. section 177 is designed to prevent alienations or conveyances of property interests, not the creation of a mere license.¹³ The Indians in *Southern Pacific* therefore, had lost nothing by consenting to the use of their lands, except the inconsistent right to treat the period of consent as a trespass.

Here, unlike *Southern Pacific*, the facts and equities point the same way. When Mountain Bell was named and served as a defendant in a 1927 suit brought to quiet title to the Pueblo's lands (*United States v. Brown*, Equity No. 1814, D.N.M.) (JA 14-35), it settled the dispute by entering into a February 23, 1928 agreement with the Pueblo (JA 38-43). On March 29, 1928, the Indian Superintendent, who was present when the agreement was reached, forwarded the agreement to the Commissioner of Indian Affairs recommending approval (JA 180-81). The Assistant Commissioner of Indian Affairs in turn forwarded the agreement to the Secretary of the Interior, recommending approval pursuant to section 17

¹²The railroad claimed that it had a right-of-way based upon maps filed with the Department of the Interior in 1881. However, the Act they filed under, 43 U.S.C. sections 934-39, expressly did not apply to Indian land. (*Id.* at 685) The railroad also claimed a right-of-way under 25 U.S.C. section 312. Although that Act allows rights-of-way for railroads across Indian reservations, the railroad had never made filings pursuant to that Act. (*Id.* at 690-94)

¹³As pointed out in the Restatement of Property, section 520, Comment a (1944), a license "is regarded in law as a mere privilege of use rather than a property interest"; accord Thompson, *supra* § 217 at 194, "In the jungle of the semantics of the property law a license is not an 'interest' in property. It is a mere privilege or permission."

of the Pueblo Lands Act (JA 182-83). The Assistant Secretary of the Interior approved it on April 13, 1928 (JA 183, see also JA 43). On May 23, 1928, Mountain Bell forwarded copies of the approved agreement to the Special Assistant to the Attorney General (JA 66-67) who then moved to dismiss the action against Mountain Bell (JA 36). On May 31, 1928, the District Court granted the Motion, stating:

... it appearing to the court that since the institution of this suit said defendant [Mountain Bell] has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1923, by the Secretary of Interior in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924,

IT IS HEREBY ORDERED that this suit be, and it is hereby, dismissed as to said defendant.

(JA 37). What more could Mountain Bell have done?¹⁴

Assuming arguendo that the above facts and circumstances do not establish that Mountain Bell had a valid right-of-way, they at least establish that Mountain Bell had consent to use the Indian land and thus was not a trespasser.

¹⁴It had reached agreement with the Indians, obtained approval from the appropriate government officials and the settlement had been sanctioned by the Court.

III

THE INDIAN CLAIMS ARE STALE AND INEQUITABLE AND SHOULD BE BARRED

The issue of whether Indian claims may be barred by applicable state statutes of limitations and laches is pending before this Court. In *County of Oneida v. Oneida Indian Nation*, U.S. Docket Nos. 83-1065, 83-1240 (argued October 1, 1984) this Court faces the question of whether the Oneidas' 175-year-old claims are time-barred.

Here¹⁵ as in *Oneida*, there has been a patently unreasonable delay in bringing suit — with no excuse given or even conceivable. After a fifty-year delay and with no warning¹⁶ Mountain Bell was told that its 1928 agreement was void, the Secretary of the Interior's approval meaningless, and the district court dismissal ineffective. The prejudice of this delay is obvious. Its right to occupy the lands had not been questioned for all these years — and then it was told that all it had done was to run up trespass damages.

While unlike *Oneida* this case involves *only* a fifty-two year delay, the practical effect is the same. As long as Indians are held immune from the application of state statutes of limitations, laches and other equitable defenses, suits like this will continue to plague the courts.

¹⁵In its December 19, 1980, answer, Mountain Bell raised the statute of limitations, laches and other equitable doctrines as affirmative defenses (JA 11,13). The District Court has not yet ruled on these defenses (JA 46).

¹⁶Mountain Bell was apparently first notified that it was trespassing with the filing of the suit in 1980. (JA 53). The BIA files confirmed this fact (JA 122).

CONCLUSION

Essentially, this case is about whether the Indians and the Secretary of the Interior can be relied upon to keep their word. Over half a century ago they entered into an agreement with Mountain Bell which resulted in the dismissal of a lawsuit. Mountain Bell relied on their promises. Now, when it suits their purposes, be they economic or political, the Indians wish to go back on their word.

If Indians are ever to achieve economic independence, it will have to be through contracts, often negotiated with the approval of the Secretary of the Interior. Their ability to do so will depend on whether they can be trusted to honor their agreements, in the same manner as non-Indians.

As Justice Douglas noted in *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) "Great nations, like great men, should keep their word." If one cannot rely upon a contract executed by the Indians and approved by the Secretary of the Interior, all such contracts become suspect.

DATED: November 21, 1984

Respectfully submitted,

PAUL D. ENGSTRAND,
DONALD R. LINCOLN,
Counsel of Record,
HENRY E. HEATER,
JENNINGS, ENGSTRAND &
HENRIKSON,
A Professional Law
Corporation,
Attorneys for Amici Curiae
City of Escondido and
Escondido
Mutual Water Company.

JOHN R. SCHELL,
KENT H. FOSTER,
Counsel of Record,
GLENN, WRIGHT, JACOBS &
SCHELL,
A Professional Law
Corporation,
Attorneys for Amicus
Curiae
Vista Irrigation District

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ALEXANDER L. STEVAS,
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No. 84-262IN THE
Supreme Court of the United States

October Term, 1984

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,*Petitioner,*

v.

PUEBLO OF SANTA ANA,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit**

**BRIEF *AMICUS CURIAE* OF THE
STATE OF NEW MEXICO IN SUPPORT
OF MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY**

PAUL BARDACKE
*Attorney General of New Mexico*CHARLOTTE URAM
BRUCE THOMPSON
Assistant Attorneys General
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6000HUGH W. PARRY
Special Assistant Attorney General
New Mexico State Highway Dept.
*Attorneys for the State of New
Mexico, amicus curiae*

November 21, 1984

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST.....	2
SUMMARY OF ARGUMENT.....	3
ARGUMENT	
IN LIGHT OF THE PLAIN LANGUAGE OF SECTION 17, THE HISTORY OF THE ASSIMILATIONIST PERIOD DURING WHICH THE STATUTE WAS PASSED, AND THE CONTEMPORANEOUS AND LONG-STANDING ADMINISTRATIVE INTERPRETATION OF THE STATUTE, THE CORRECT INTERPRETATION OF SECTION 17 OF THE PUEBLO LANDS ACT IS THAT IT ALLOWED PUEBLO INDIANS TO CONVEY LANDS VOLUNTARILY, SUBJECT TO THE APPROVAL OF THE SECRETARY OF THE INTERIOR.....	3
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
<i>Covelo Indian Community v. Watt</i> , 551 F.Supp. 366 (D.D.C. 1982)	5
<i>McDonald v. Thompson</i> , 305 U.S. 263 (1983)	4
<i>Montana v. United States</i> , 450 U.S. 544 (1981)	6
<i>Pueblo of Sandia v. New Mexico Highway Commission, et al.</i> , No. 82-1522C (D.N.M., filed June 13, 1983)	2
<i>Solem v. Bartlett</i> , ___ U.S. ___, 104 S.Ct. 1161 (1984)	6
<i>Udall v. Tallman</i> , 380 U.S. 1 (1965)	5
<i>United States v. Candelaria</i> , 271 U.S. 432 (1926)	6
 Statutes:	
23 U.S.C. §§ 103-157	2
25 U.S.C. § 177	6
25 U.S.C. § 331	6
25 U.S.C. § 348	6
Pueblo Lands Act of June 7, 1924 43 Stat. 636	passim
Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984	6
General Allotment Act of 1887, ch. 119, 24 Stat. 388	6
Appropriations Act of March 3, 1901, ch. 832, § 3, 31 Stat. 1058	7

	Page
Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3	7
Act of March 3, 1921, ch. 119, § 1, 41 Stat. 1225	7

Other Authorities Cited:

<i>Felix Cohen's Handbook of Federal Indian Law</i> (1982 ed.) pp. 127-134	5
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BRIEF *AMICUS CURIAE* OF THE
STATE OF NEW MEXICO IN SUPPORT
OF MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY

The State of New Mexico files this brief *amicus curiae* in support of Mountain States Telephone and Telegraph Company pursuant to Rule 36 of the Supreme Court Rules.

STATEMENT OF INTEREST

The State of New Mexico acquired one right-of-way from the Sandia Pueblo pursuant to Section 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 ("Section 17"), and a second right-of-way from the Santa Ana Pueblo, apparently pursuant to Section 17. The State acquired these rights-of-way to construct United States Highway 85, a Federal Aid Primary Highway. *See*, 23 U.S.C. §§ 103-157. U.S. 85 is a major highway paralleling Interstate 25, providing access to land near the Interstate. Prior to the construction of Interstate 25, U.S. 85 was the principal north-south highway connecting New Mexico's largest city, Albuquerque, to the capital in Santa Fe. The State rights-of-way acquired across the Santa Ana and Sandia Pueblos were approved by the Secretary of the Interior on March 13, 1926 and March 29, 1928, respectively.

If this Court holds that rights-of-way acquired by Mountain States pursuant to Section 17 are invalid, the State faces the possibility of losing its existing rights-of-way. The Sandia Pueblo has already sued the State of New Mexico seeking to eject the State from 8 miles of U.S. 85 and to recover trespass damages of \$150,000. The Sandia Pueblo cited the District Court's decision in the present case as the basis for the ejectment action. *Pueblo of Sandia v. New Mexico Highway Commission, et al.*, No. 82-1522C (D.N.M., filed June 13, 1983). That case is in abeyance pending the decision of this Court. The State has already had to delay needed road resurfacing work on U.S. 85 because of pending litigation over its rights-of-way.

If the Court rules for the Pueblo, the State may find itself with a multimillion dollar highway leading up to and out of these Pueblos and no right-of-way connecting these highways. The State would have to negotiate a reasonable settlement to re-acquire the highway built across the Pueblos which may not be possible.

SUMMARY OF ARGUMENT

Section 17 of the Pueblo Lands Act was passed at a time when Congress' policy toward Indians was to attempt to assimilate Indians into the non-Indian society. Section 17, which in part allowed voluntary transfers of Pueblo lands subject to the approval of the Secretary of the Interior, was consistent with the policies of the time. Many entities, including the State of New Mexico, purchased rights-of-way in good faith from the Pueblos. Those purchases were approved by the Secretary based on the clear language of Section 17. The validity of those rights-of-way should be upheld.

ARGUMENT

IN LIGHT OF THE PLAIN LANGUAGE OF SECTION 17, THE HISTORY OF THE ASSIMILATIONIST PERIOD DURING WHICH THE STATUTE WAS PASSED, AND THE CONTEMPORANEOUS AND LONG-STANDING ADMINISTRATIVE INTERPRETATION OF THE STATUTE, THE CORRECT INTERPRETATION OF SECTION 17 OF THE PUEBLO LANDS ACT IS THAT IT ALLOWED PUEBLO INDIANS TO CONVEY LANDS VOLUNTARILY, SUBJECT TO THE APPROVAL OF THE SECRETARY OF THE INTERIOR.

Section 17 of the Pueblo Lands Act provides:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall not hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto,

made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

This statute on its face has two parts. The first provides for involuntary transfers of Pueblo land. The second provides for voluntary transfers of Pueblo land. Under the first part of Section 17 one may not acquire lands from a Pueblo without an act of Congress. The second part of Section 17 is an act of Congress validating voluntary transfers of Pueblo land by sale, grant, lease or conveyance if approved by the Secretary of the Interior.

The Pueblo of Santa Ana places a different interpretation on Section 17. The Pueblo interprets Section 17 to prohibit all transfers of Pueblo lands unless Congress has approved the method for such transfer. The second portion of Section 17 is claimed by the Pueblo to place an additional restriction on any congressionally approved transfer of Pueblo land. Any transfer of Pueblo land pursuant to an act of Congress would be invalid unless approved by the Secretary of the Interior. Brief of Respondent in Opposition to Petition for Certiorari at 13-14. Under the Pueblo's interpretation of Section 17, an act of Congress transferring Pueblo lands would be without effect unless approved by the Secretary of the Interior.

There is no reason to believe Congress intended to limit its future legislative authority to deal with the Pueblo Indians by allowing the Secretary of the Interior to approve or disapprove congressional action. Furthermore, if in enacting Section 17, Congress only wanted to preclude all future transfers of Pueblo lands except as approved by Congress, there was no need for the second half of Section 17. Statutes should be read to give effect to all parts of the statute. *McDonald v. Thompson*, 305

U.S. 263, 266 (1938). The only interpretation of Section 17 that gives effect to all parts of the statute is one which interprets the second half of Section 17 to allow voluntary transfers subject to Secretarial approval.

The interpretation of Section 17 that follows from the clear statutory language is the interpretation used consistently by the United States since the statute's enactment. The Bureau of Indian Affairs' administrative use of this interpretation is well documented by Mountain States. Long-standing administrative interpretations are entitled to deference.¹ *Udall v. Tallman*, 380 U.S. 1, 16 (1965). As recently as June 2, 1982, the date of the District Court decision in this case, the Solicitor's Office of the Department of the Interior refused to prosecute trespass claims on behalf of the Pueblos based on rights-of-way acquired pursuant to Section 17. *Covelo Indian Community v. Watt*, 551 F.Supp. 366, 374 (D.D.C. 1982).

Not only the language of Section 17 and the long-standing administrative interpretation but also history supports the interpretation that Section 17 was intended to allow voluntary transfers of Pueblo land. The 1924 Pueblo Lands Act was adopted during a period when the United States was attempting to break up reservations and bring Indians into the mainstream of American life. The years 1887 through 1928 are recognized as the period of assimilation. *Felix Cohen's Handbook of Federal Indian Law* (1982 ed.) pp. 127-134. Placing Section 17 in the context of assimilation shows that the interpretation advanced by Mountain States is consistent with the then-existing

¹ The Tenth Circuit, without specifically stating that the administrative construction of Section 17 by the agency charged with administering the Act was to allow voluntary transfers, did determine that it would not give any weight to the B.I.A.'s construction because that construction was contrary to what the Tenth Circuit felt was clear language contrary to the interpretation of the B.I.A.

congressional policy. To assert that federal policy toward Indians has always been one of protecting Indian possessory rights and that Section 17 extended and confirmed this policy to the Pueblos is to misunderstand the assimilation period.²

The General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, and 381), marked the beginning of the period of assimilation. Reservations were partitioned by the President and individual allotments given to tribal members. 25 U.S.C. § 331. Allotments were held in trust by the United States for the individual Indians during a period of incompetency and then patented by the United States in fee to the individual Indian who was then free to alienate the land. 25 U.S.C. § 348.

The practice of issuing allotments and subsequent fee patents was not ended by Congress until the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479). Congressional policy under the General Allotment Act, which was in effect in 1924 at the time of the enactment of Section 17, was clearly one of allowing reservation land to pass out of tribal control. *Solem v. Bartlett*, ___ U.S. ___, 104 S.Ct. 1161, 1164 (1984); *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981).

The interpretation of Section 17 advanced by Mountain States Telephone and Telegraph, which would allow Pueblos to voluntarily transfer their land subject to the approval of the Secretary of the Interior, is consistent with the assimilationist

² The Indian Non-Intercourse Act 25 U.S.C. § 177, which has been made applicable to the Pueblos, *United States v. Candelaria*, 271 U.S. 432 (1926), provides that Indian title can only be extinguished by an act of the sovereign. Since the second half of Section 17 represents an act of the sovereign allowing title to be extinguished, it is not in conflict with the Non-Intercourse Act or the policy of that Act.

policies of the time.³ The interpretation of Mountain States regarding Section 17 is consistent with the plain language of the statute, and long-standing administrative interpretation. Any other interpretation puts into doubt land titles acquired and held in good faith based on conveyances made by the Pueblos and approved by the Secretary of the Interior. Any other interpretation harms those who did not acquire title pursuant to Section 17 but who have relied on the existence of highways, railroads, and utilities built on rights-of-way acquired under the Act.

³ The General Allotment Act represents only one manifestation of congressional policy to remove any special status for Indians and Indian land during the period of assimilation. *E.g.*, Appropriations Act of March 3, 1901, ch. 832, § 3, 31 Stat. 1058, 1083-84 (25 U.S.C. §§ 319, 357) (authorizing the Secretary of Interior to grant rights of way across tribal and allotted lands for telephone and telegraph lines and offices and subjecting allotted lands to condemnation pursuant to the law of the state or territory); Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 32 (codified as amended at 25 U.S.C. § 399) (allowing the Secretary to issue mineral leases on tribal lands without tribal approval); Act of March 3, 1921, ch. 119, § 1, 41 Stat. 1225, 1232 (25 U.S.C. § 393) (allowing lease of allotments subject only to approval of Indian agent, not Secretary). *Amicus* does not contend that all acts of Congress related to Indians during the period 1889 through 1928 were assimilationist. It is clear that Mountain State's interpretation of Section 17 is consistent with Congress' policy toward Indians during the assimilationist period and with the scope of Congress' perceived duties to tribes.

CONCLUSION

Amicus respectfully urges that the decision of the Tenth Circuit be reversed and the case remanded.

Respectfully submitted,

PAUL BARDACKE

Attorney General of New Mexico

CHARLOTTE URAM

BRUCE THOMPSON

Assistant Attorneys General

Post Office Drawer 1508

Santa Fe, New Mexico 87504-1508

(505) 827 -6000

HUGH W. PARRY

Special Assistant Attorney General

New Mexico State Highway Department

P. O. Drawer 1149

Santa Fe, New Mexico 87504-1149

*Attorneys for the State of New Mexico,
amicus curiae*

November 21, 1984

Office-Supreme Court, U.S.
FILED

NOV 21 1984

ALEXANDER L. STEVAS,
CLERK

No. 84-262

In The
Supreme Court of the United States
October Term, 1984

o

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,

Petitioner,

vs.

PUEBLO OF SANTA ANA,

Respondent.

o

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

o

JOINT APPENDIX

o

KATHRYN MARIE KRAUSE,
ESQ.
(Counsel of Record)
MARY C. SNOW, ESQ.
931 14th Street, Room 1300
Post Office Box 600
Denver, Colorado 80202
(303) 624-2200

Attorneys for Petitioner

RICHARD W. HUGHES
(Counsel of Record)
SCOTT E. BORG, ESQ.
Luebben, Hughes & Tomita
201 Broadway S.E.
Albuquerque, New Mexico
87102
(505) 842-6123

Attorneys for Respondent

PETITION FOR CERTIORARI FILED AUGUST 13, 1984
CERTIORARI GRANTED OCTOBER 9, 1984

196 pp

TABLE OF CONTENTS

	Page
Relevant Docket Entries	1
Amended Complaint, filed March 10, 1981	3
Answer, filed December 19, 1980	7
Exhibits to Answer	
Exhibit A—Subpoena in Chancery and Com- plaint in Case No. 1814 Equity, U.S. Dis- trict Court, District of New Mexico	14
Exhibit B—Motion to Dismiss in Case No. 1814	36
Exhibit C—Order of Dismissal in Case No. 1814	37
Exhibit D—Agreement between Pueblo of Santa Ana and Mountain Bell dated Feb- ruary 23, 1928; approved by Assistant Sec- retary of Interior on April 13, 1928	38
Motion by Pueblo of Santa Ana to Strike Mountain Bell's Affirmative Defenses, filed March 30, 1981.....	43
Minute Order Denying Pueblo's Motion to Strike Moun- tain Bell's Affirmative Defenses, filed April 15, 1981	45
Order Amending Order of April 15, 1981 to Strike Mountain Bell's Defenses 1, 2, 3, filed July 23, 1981.....	45
Mountain Bell's Motion for Partial Summary Judg- ment, filed December 30, 1981	46
Relevant Appendix Entries from Mountain Bell's Memorandum Brief in Support of Its Motion for Partial Summary Judgment, filed Decem- ber 30, 1981	48
Appendix III, Interrogatory Answers	49
Appendix IV, Response to Request for Ad- missions	53

TABLE OF CONTENTS—Continued

	Page
Pueblo of Santa Ana's Appendix of Relevant Exhibits to its Response to Mountain Bell's Motion for Partial Summary Judgment, filed February 1, 1982; docketed March 29, 1982	63
Exhibit B—Correspondence from George A. H. Fraser to Milton Smith, Jr., March 10, 1928	64
Exhibit C—Correspondence from Milton Smith, Jr. to George A. H. Fraser, March 12, 1928	65
Exhibit D—Correspondence from Milton Smith, Jr. to George A. H. Fraser, May 23, 1928.....	66
Exhibit E—Correspondence from George A. H. Fraser to Milton Smith, Jr., May 31, 1928	67
Exhibit F—Correspondence from Milton Smith, Jr. to George A. H. Fraser, June 1, 1928.....	68
Exhibit G—Marshal's Return of Service, <i>U.S. v. Brown</i>	69
Exhibit H—Correspondence from Milton Smith, Jr. to J. A. Kelly, September 2, 1927	71
Exhibit I—Correspondence from George A. H. Fraser to the United States Attorney General, November 4, 1925	73
Exhibit J—Application for Right-of-Way across Santa Ana Pueblo Grant, December 30, 1929, by Mountain States Tel. & Tel. Co.	81
Memorandum Opinion and Order of the United States District Court for the District of New Mexico, dated June 2, 1982; docketed June 3, 1982	85
Order Amending Opinion of District Court of New Mexico (filed June 2, 1982), to Allow for an Interlocutory Appeal, filed July 13, 1982, docketed July 14, 1982	94

TABLE OF CONTENTS—Continued

	Page
Order of Tenth Circuit Court of Appeals granting Mountain Bell's Petition for Permission to Appeal, dated January 28, 1983	95
Slip Opinion of the United States Court of Appeals for the Tenth Circuit, dated May 14, 1984	96
Judgment of the United States Court of Appeals for the Tenth Circuit, entered May 14, 1984	108
Deposition of Louisa B. Sando taken July 15, 1981.....	110
Relevant Exhibits to Ms. Sando's Deposition	
Exhibit 2—Correspondence from Commissioner of Indian Affairs to Secretary of the Interior, dated April 23, 1928 regarding Santa Ana and Zia Pueblos' Section 17 Right-of-Way for Santa Fe Northwestern Railway Co.	128
Exhibit 3—Right-of-Way Agreement between the Pueblo of Santa Ana and The Atchison, Topeka & Santa Fe Railway Co., dated October 5, 1928	130
and	
—Right-of-Way Agreement between the Pueblo of Santa Ana and the Santa Fe Northwestern Railway Co., dated March 22, 1926	133
Exhibit 4—Right-of-Way Agreement between the Pueblo of Santa Ana and Southern Union Gas Co., dated September 9, 1930.....	141
Exhibit 5—Right-of-Way Agreement between the Pueblo of Santa Ana and Postal Telegraph-Cable Company, dated February 27, 1928	147
Exhibit 6—Correspondence from Assistant Commissioner of Indian Affairs to Secretary of the Interior regarding Right-of-	

TABLE OF CONTENTS—Continued

	Page
Way Agreement between Pueblo of Santa Ana and Board of County Commissioners of Sandoval County, dated September 15, 1928	154
and	
—Right-of-Way Agreement between Pueblo of Santa Ana and the Board of County Commissioners of Sandoval County, dated June 26, 1926	156
Exhibit 7—Department of Interior's Approval (by Assistant Secretary John Edwards) of Right-of-Way Agreement between Pueblo of Santa Ana and Board of County Commissioners of Sandoval County, dated November 3, 1928	160
and	
—Right-of-Way Agreement from Pueblo of Santa Ana to New Mexico Power Company, dated August 17, 1928	160
Exhibit 8—Right-of-Way Agreement between Pueblo of Santa Ana and United States Bureau of Reclamation, dated November 4, 1957	165
and	
—Resolution of Pueblo of Santa Ana's Council to Grant right-of-way to United States Bureau of Reclamation, dated August 27, 1957	169
Exhibit 9—Right-of-Way Agreement from Pueblo of Santa Ana to United States Bureau of Reclamation, dated June 15, 1956.....	174
and	

TABLE OF CONTENTS—Continued

	Page
—Resolution of Pueblo of Santa Ana's Council to grant right-of-way to United States Bureau of Reclamation, dated December 13, 1955	177
Exhibit 11—Correspondence from Lem A. Towers, Superintendent of Southern Pueblo Agency, to Commissioner of Indian Affairs regarding Right-of-Way Agreement between Mountain Bell and the Pueblo of Santa Ana, dated March 29, 1928.....	180
Exhibit 12—Correspondence from Commissioner of Indian Affairs to the Secretary of the Interior regarding Right-of-Way Agreement between Mountain Bell and the Pueblo of Santa Ana, dated April 13, 1928	181
Exhibit 13—Correspondence from Mountain Bell to Lem A. Towers regarding Right-of-Way Agreement between Mountain Bell and the Pueblo of Santa Ana, dated March 27, 1928	183
and	
—Correspondence from Mountain Bell to the Secretary of the Interior regarding Right-of-Way Agreement between Mountain Bell and the Pueblo of Santa Ana, dated March 23, 1928	184
Correspondence from Omar Bradley regarding changes in Louisa B. Sando's deposition	187

RELEVANT DOCKET ENTRIES

United States District Court for the District of New Mexico

Date	Action Taken
10-10-80	Complaint Filed
12-15-80	Answer Filed
03-09-81	Motion to File Amended Complaint
03-10-81	Motion to File Amended Complaint Granted and Amended Complaint Docketed; Order That Original Answer Shall be Considered as Answer to the Amended Complaint
03-30-81	Motion by Pueblo of Santa Ana to Strike Mountain Bell's Affirmative Defenses
04-15-81	Pueblo's Motion to Strike Mountain Bell's Affirmative Defenses Denied
07-23-81	Amended Order of 04-15-81 to Strike Mountain Bell's Affirmative Defenses Nos. 1, 2, and 3
12-30-81	Motion by Mountain Bell for Partial Summary Judgment Filed With Supporting Memorandum
02-01-82	Motion by Pueblo of Santa Ana to File a Response in Excess of Twenty Pages With Supporting Response Attached; Response Docketed 03-29-82
03-29-82	
03-19-82	Mountain Bell Reply Memorandum Filed
06-03-82	District Court Memorandum Opinion and Order Entered on the Docket
07-07-82	Motion by Mountain Bell to Certify Case for Interlocutory Appeal With Supporting Memorandum Filed
07-14-82	District Court Order Granting Mountain Bell's Motion for an Interlocutory Appeal Entered on the Docket

United States Court of Appeals for the Tenth Circuit

07-22-81 Mountain Bell Petition for Permission to Appeal

01-28-83 Order for Permission to Appeal Granted to Mountain Bell

04-25-83 Motion of Atchison, Topeka & Santa Fe Railway for Leave to File Amicus Brief

05-12-83 Order Permitting Atchison, Topeka & Santa Fe Railway to File Amicus Curiae Brief

05-25-83 Motion of Pueblo de Acoma for Leave to File Brief as an Amicus Curiae

06-07-83 Motion of Public Service Company of New Mexico for Leave to Join Amicus Curiae Brief of Atchison, Topeka & Santa Fe

06-15-83 Motion of Pueblo de Acoma to File Amicus Brief Granted

07-08-83 Motion of Atchison, Topeka & Santa Fe Railway for Leave to File Supplemental Brief as an Amicus Curiae

07-15-83 Motion of Public Service Company of New Mexico for Leave to Join Amicus Curiae Brief of Atchison, Topeka and Santa Fe Railway Company Granted

07-18-83 Motion of Atchison, Topeka & Santa Fe Railway for Leave to File Supplemental Brief as an Amicus Curiae Granted

01-31-84 Oral Argument Held in the Tenth Circuit

05-14-84 Tenth Circuit Memorandum Opinion and Order Issued; Judgment Entered on the Same Day

06-14-84 Order Staying the Mandate in the Tenth Circuit Until 7-14-84

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

—o—

No. CIV 80 841 M

—o—

PUEBLO OF SANTA ANA,
Plaintiff,

v.

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

—o—

AMENDED COMPLAINT
(Filed March 10, 1981)
FIRST CLAIM

1. This Court has jurisdiction of this action pursuant to 28 U.S.C., Section 1362.

2. Plaintiff is an Indian tribe, recognized as such by the United States government.

3. Defendant, Mountain States Telephone and Telegraph Company (or Mountain Bell, as defendant company is more commonly known and will be referred to hereafter), is a corporation organized and existing under the laws of the State of Colorado and authorized to do business in New Mexico. Defendant is engaged primarily in the electronic transmission of telecommunications.

4. Plaintiff is the beneficial owner of a tract of land situated in Sandoval County, New Mexico, known as El Ranchito, which land is held in trust for plaintiff by the

United States of America. Without waiving or in any manner limiting any assertion of title to the area of overlap between El Ranchito and the San Felipe Grant, and for purposes of this action only, plaintiff makes no claim herein with respect to any portion of defendant's line that lies north of the southern boundary of the San Felipe Pueblo Grant. Henceforth as used in this action, all references to "El Ranchito", "plaintiff's land", etc. shall be construed to include only that portion of El Ranchito that lies south of the southern boundary of the San Felipe Pueblo Grant.

5. The Act of June 30, 1834 (4 Stat. 730), codified at 25 U.S.C., Section 177, otherwise known as the Indian Non-Intercourse Act, was made applicable to Santa Ana lands by the Act of February 27, 1851 (9 Stat. 587).

6. Mountain States Telephone and Telegraph Company was formed in 1911 by the merger of three firms, Colorado Telephone Company, Rocky Mountain Bell Telephone Company, and Tri-State Telephone and Telegraph Company. As such, Mountain States Telephone and Telegraph Company is the successor-in-interest of the three named companies.

7. In 1904 or 1905 Colorado Telephone Company, a predecessor company of Mountain Bell, began construction of a long distance telephone trunkline from Raton to Socorro, New Mexico as part of a proposed Denver to El Paso line.

8. In 1905 the Raton-Socorro segment of the Denver-El Paso trunkline was constructed upon and across the eastern portion of El Ranchito.

9. At no time prior to construction of the line across El Ranchito did the governing body of the Pueblo of Santa Ana grant permission to any predecessor of Mountain Bell to enter upon Santa Ana lands for purposes related to construction of the Denver-El Paso line.

10. From 1905 to the present, defendant and its predecessors-in-interest have continuously utilized the Denver-El Paso line and in doing so have occupied and utilized plaintiff's land for its own commercial purposes, without a valid right-of-way or other lawful authorization or consent thereto, which use and occupancy constitute trespass on plaintiff's land.

11. Defendant is now and has continuously since 1905, as a result of its unauthorized use of plaintiff's land, been unjustly enriched at plaintiff's expense.

12. Plaintiff is entitled to an accounting from defendant of the net rents, issues, and profits that have accrued to defendant by virtue of its wrongful use and occupancy of plaintiff's land for transmission of telecommunications, and for judgment against defendant in the amount so determined, plus interest from the date such payments were due, and all costs associated with this action.

13. Plaintiff is further entitled to an injunction against further unauthorized use of plaintiff's land by defendant, unless accounting for rents and profits is made to plaintiff on a regular basis.

14. These trespasses were willful and wanton and in gross disregard of plaintiff's rights, and defendant is therefore liable to plaintiff for exemplary damages.

SECOND CLAIM

15. Plaintiff here realleges paragraphs 1 through 10 above, the same as though they were fully set out herein.

16. On numerous occasions during the period of defendant's unlawful use and occupancy of the land in question, agents or employees of the defendant have come upon the land, at the direction of defendant, for purposes solely related to defendant's business, without obtaining any consent or authorization therefor from the plaintiff.

17. Each such unauthorized entry by defendant's agents or employees constitutes a trespass, for which defendant is liable to plaintiff for damages in the amount of \$100.

18. These trespasses were willful and wanton and in gross disregard of plaintiff's rights, and defendant is therefore liable to plaintiff for exemplary damages.

19. Plaintiff is further entitled to an injunction against further unauthorized entries onto El Ranchito by defendant for any purpose relating to the Denver-El Paso Toll line.

WHEREFORE, plaintiff requests that this court order defendant to account to plaintiff for the net rents, issues and profits which have accrued to defendant from the transmission of telecommunications over and across plaintiff's lands since the date of construction of the subject telephone trunkline, and to enter judgment against defendant in the amount so determined, plus interest at six percent per annum from the date such sums accrued; and to enjoin the defendant from further wrongful use of plaintiff's land without rendering similar accountings

on a regular basis; and to enter judgment against defendant in the amount of \$100 for each unlawful entry onto plaintiff's land and to enjoin defendant further from such entries; and to enter judgment in the amount of \$500,000 in exemplary damages, plus costs and interest and for such other and further relief as seems just in the premises.

Respectfully submitted,

LUEBBEN, HUGHES & KELLY
805 Tijeras, NW
Albuquerque, NM 87102
(505) 842-6123

By /s/ JOHN J. KELLY
Attorneys for Plaintiff

(Certificate of Mailing Omitted in Printing.)

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEW MEXICO

(Title omitted in printing)

ANSWER

(Filed Dec. 19, 1980)

The Mountain States Telephone and Telegraph Company (hereinafter called "Mountain Bell"), answers and pleads to the Plaintiff's Complaint as hereinafter set forth.

1. The allegations of paragraph 1 of the Complaint are admitted.

2. In answer to the allegations of paragraph 2 of the Complaint, Mountain Bell states that it is without knowledge or information sufficient to form a belief as to the truth of the averments and, therefore, denies the allegations.

3. The allegations of paragraph 3 of the Complaint are admitted.

4. The allegations of paragraph 4 of the Complaint are denied.

5. In answer to the allegations of paragraph 5 of the Complaint, Mountain Bell states that the statutes referred to speak for themselves.

6. In answer to the allegations of paragraph 6 of the Complaint, Mountain Bell admits that it was formed in 1911 by the merger of Colorado Telephone Company and Tri-State Telephone and Telegraph Company, which then purchased property of Rocky Mountain Bell Telephone Company. All other allegations of paragraph 6 of the Complaint not specifically admitted are denied.

7. In answer to paragraph 7 of the Complaint, Mountain Bell admits that in 1904 or 1905, the Colorado Telephone Company began construction, continued construction or engaged in reconstruction of a telephone toll line or toll lines at various points between Denver and Raton, New Mexico; and between Las Vegas and Socorro, New Mexico. This later became known as the Denver-El Paso Toll Line. All other allegations of paragraph 7 of the Complaint not specifically admitted are denied.

8. In answer to paragraph 8 of the Complaint, Mountain Bell admits that in 1904 or 1905, the Colorado Telephone Company acquired rights-of-way upon and across the El Ranchito Grant, but states that it is without knowledge or information sufficient to form a belief as to the truth of all other allegations of paragraph 8 of the Complaint and, therefore, denies all other allegations.

9. In answer to the allegations of paragraph 9 of the Complaint, Mountain Bell states that it is without knowledge or information sufficient to form a belief as to the truth of the averments and, therefore, denies the allegations.

10. The allegations of paragraphs 10, 11, 12, 13 and 14 are denied.

11. Paragraph 15 of the Complaint realleges the allegations of paragraphs 1 through 10 of the Complaint. In answer thereto, Mountain Bell here reiterates its answers to paragraphs 1 through 10 of the Complaint.

12. The allegations of paragraphs 16, 17, 18 and 19 of the Complaint are denied.

13. All allegations of the Complaint not specifically admitted are denied.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Plaintiff may not have standing or capacity to bring this suit or to assert the claims alleged.

THIRD AFFIRMATIVE DEFENSE

The Plaintiff has failed to join the United States of America and the Secretary of the Interior, who are necessary and indispensable parties to this action for a just adjudication of all of the issues and of the rights of the Defendant and without whom complete relief cannot be

accorded to those already a party. In the absence of the United States of America and the Secretary of the Interior being a party, the Plaintiff's claim and this action should be dismissed.

FOURTH AFFIRMATIVE DEFENSE

Portions of the property which is the subject of the Complaint may not be or may not have been owned by the Plaintiff during all or part of the period covered by the Complaint. As to those portions of the property and as to those periods of time, the Plaintiff may not be the real party in interest, may not have standing or may have failed to join indispensable parties plaintiff.

FIFTH AFFIRMATIVE DEFENSE

In 1927, the United States of America, as Guardian of the Pueblo of Santa Ana in the State of New Mexico, brought an action against Mountain Bell and other defendants with respect to the same property that is the subject of this current suit. That action was Case No. 1814 in Equity in the United States District Court for the District of New Mexico. In that suit, the Plaintiff claimed title to the property, alleged that Mountain Bell had no title or interest in the property and asserted that Mountain Bell had trespassed on the property. The Plaintiff prayed that title be affirmed and quieted in the Plaintiff and that the Plaintiff be awarded such other relief as was proper. Upon motion of the Plaintiff, Mountain Bell was dismissed from the suit on May 31, 1928, the Court finding in its Order of Dismissal that Mountain Bell had, since the institution of the suit, "... secured good and sufficient title to the right-of-way and premises

...". A copy of the Summons and Complaint are attached as Exhibit "A". A copy of the Motion to Dismiss Mountain Bell is attached as Exhibit "B". A copy of the Order dismissing Mountain Bell is attached as Exhibit "C".

SIXTH AFFIRMATIVE DEFENSE

The Plaintiff's claims are barred by collateral estoppel or res judicata.

SEVENTH AFFIRMATIVE DEFENSE

On February 23, 1928, the Plaintiff agreed and granted to the Defendant an easement across the Plaintiff's property" . . . to construct, maintain and operate a telephone and telegraph pole line, including the necessary poles, cables, conduits, wires and fixtures, with the right to permit the attachment of the wires of any other party, and the right to trim any trees along said line so as to keep the wires cleared at least forty-eight (48) inches, and to set the necessary guy and brace poles and anchors, and to attach thereto the necessary guy wires, . . ." That agreement and grant was duly approved by the Department of the Interior on April 13, 1928. A copy of the agreement and grant is attached hereto as Exhibit "D".

EIGHTH AFFIRMATIVE DEFENSE

The Plaintiff has long known, or is charged with knowledge, of the existence, construction, maintenance and use of the subject telephone line. Moreover, the Plaintiff has benefitted or may have benefitted from the existence of and the service provided by the telephone line. By reason thereof, the Plaintiff's allegations and assertions in 1980 of claims for trespass damages since 1905 are barred.

NINTH AFFIRMATIVE DEFENSE

The Defendant Mountain Bell, and its predecessors, acted innocently, in good faith and under color of title in constructing, maintaining and operating the telephone line in the belief that it had the right to do so and without any knowledge of any claims by the Plaintiff.

TENTH AFFIRMATIVE DEFENSE

The Defendant and its predecessors have openly, notoriously, adversely and continuously constructed, maintained and operated the subject telephone line across Plaintiff's claimed property under color of title for three-quarters of a century and have thereby acquired the right, title and interest to have, construct, maintain and operate the telephone line. As a result, the Plaintiff has no right or claims for trespass or damages.

ELEVENTH AFFIRMATIVE DEFENSE

The Plaintiff is estopped from asserting and recovering upon the claims alleged in the Complaint.

TWELFTH AFFIRMATIVE DEFENSE

The Plaintiff has waived its claims.

THIRTEENTH AFFIRMATIVE DEFENSE

The Plaintiff's claims are barred upon the grounds of laches.

FOURTEENTH AFFIRMATIVE DEFENSE

The Plaintiff has released its claims for trespass and damages.

FIFTEENTH AFFIRMATIVE DEFENSE

The Plaintiff has licensed the Defendant to construct, operate and maintain its toll line across the Plaintiff's property, and the Plaintiff's claims for trespass and damages are barred.

SIXTEENTH AFFIRMATIVE DEFENSE

The Plaintiff has given or granted to the Defendant actual or implied consent and authorization to construct, operate and maintain the telephone line across the Plaintiff's property, and the Plaintiff's claims for trespass and damages are barred.

SEVENTEENTH AFFIRMATIVE DEFENSE

The Plaintiff's claims are barred by the applicable statutes of limitations.

EIGHTEENTH AFFIRMATIVE DEFENSE

The Plaintiff's claims have been settled and compromised.

NINETEENTH AFFIRMATIVE DEFENSE

In the event the Court determines that Mountain Bell, or its predecessors, did in fact trespass upon Plaintiff's property, Mountain Bell or its predecessors thereby acquired the right, title and interests to the property and to construct, operate and maintain the telephone line across the property by inverse condemnation.

TWENTIETH AFFIRMATIVE DEFENSE

Plaintiff's prayer for injunctive relief and future damages should be denied on the ground of mootness since

the Defendant Mountain Bell has dismantled and removed its telephone line from the property which is the subject of the Complaint.

WHEREFORE, the Defendant prays that the Plaintiff's claims be denied, that the action be dismissed with prejudice against the Plaintiff, and that the Defendant be awarded its costs, including reasonable attorneys' fees.

/s/ Stuart S. Gunckel

/s/ John R. Stoller

Suite 1300, 931-14th Street
Denver, Colorado 80202
(303) 624-2200

/s/ H. Perry Ryon

201 Third N. W.
Albuquerque, New Mexico 87102
(505) 765-5621

Attorneys for The Mountain States
Telephone and Telegraph
Company

Address of Mountain Bell:

201 Third, N.W.

Albuquerque, New Mexico 87102

(Certificate of Mailing Omitted in Printing.)

/s/ H. Perry Ryon

EXHIBIT "A" TO ANSWER

No. 1814 Equity

SUPOENA IN CHANCERY—U. S. District Court,
District of New Mexico

UNITED STATES OF AMERICA)
) SS:
DISTRICT OF NEW MEXICO)

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF NEW MEXICO

SITTING AT SANTA FE

THE PRESIDENT OF THE UNITED STATES OF
AMERICA

TO

Charles F. Brown, Sostenes Jaramillo, The Most Reverend A. T. Daeger as The Archbishop of Santa Fe, and as representing the Roman Catholic Church in New Mexico; Virginia Perea, Carlota P. Otero, Barbara Perea Yrisarri; The Atchison Topeka and Santa Fe Railway Company, a corporation; The Western Union Telegraph Company, a corporation; The Postal Telegraph Company of New Mexico, a corporation; Maurico Montoya, Francisquita Valdez, Mrs. Julianita Valdez, Mrs. Emilia Valdez, Manuel Gutierrez, Miguel Montoya, Onesimo Valdez, Mrs. Porfilia Archebueque, Jesus Teofilo Valdez, Francisco Griego, Diego Gutierrez, Mrs. Juana Gallegos, Mrs. Genoveva Griego, Juan N. Griego and Remedios Baca, The Mountain States Telephone and Telegraph Company, a corporation.

Court of and (Illegible) for the District of New Mexico, in the City of (Illegible), the (Illegible) (Illegible) on or before the twentieth day after service, excluding the day thereof, to answer a bill of complaint of The United States of America, as Guardian of the Pueblo of Santa Ana, in the State of New Mexico this day filed in the office of the clerk of said court, in said city of Santa Fe, then and there to receive and abide by such judgment and decree as shall then or thereafter be had upon said bill of complaint, upon pain of judgment being pronounced against you by default and a decree had and entered accordingly.

To the MARSHAL OF THE DISTRICT OF NEW MEXICO, to execute and make due return within twenty days from the date hereof.

By
Deputy Clerk.

The above-named defendants are hereby notified that unless they and each of them shall file an answer or other defense in the office of the clerk of said court, at the city of Santa Fe aforesaid, on or before the twentieth day after service, excluding the day thereof the bill of complaint may be taken pro confesso.

By _____
Deputy Clerk

IN THE DISTRICT COURT
No. 1814 IN EQUITY

THE UNITED STATES OF
AMERICA, as Guardian of
the PUEBLO OF SANTA

V.

CHARLES F. BROWN, SOSTENES JARAMILLO, THE MOST REVEREND A. T. DAEGER as Archbishop of Santa Fe, and as Representing the Roman Catholic Church in New Mexico; VIRGINIA PEREA YRISARRI; THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation; THE WESTERN UNION TELEGRAPH COMPANY, a Corporation; THE POSTAL TELEGRAPH-CABLE COMPANY OF NEW MEXICO, a Corporation; THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Corporation; MAURICO MONTOYA, FRANCISQUITA VALDEZ, MRS. JULIANITA VALDEZ, MRS. EMILIA VALDEZ, MANUEL GUTIERREZ, MIGUEL MONTOYA, ONESIMO VALDEZ, MRS. PORFILLIA ARCHEBUEQUE, JESUS TEOFILO VALDEZ, FRANCISCO GRIEGO, DIEGO GUTIERREZ, MRS. JUANA GALLEGOS, MRS. GENOVEVA GRIEGO, JUAN N. GRIEGO and REMEDIOS BACA.

Defendants,

COMES NOW The United States of America, as guardian of the Pueblo of Santa Ana, in the State of New Mexico, and brings this its Bill of Complaint against Charles F. Brown, Sostenes Jaramillo, The Most Reverend A. T. Daeger, as Archbishop of Santa Fe, and as representing the Roman Catholic Church in New Mexico; Virginia Perea, Carlota P. Otero, Barbara Perea Yrisarri, The Atchison, Topeka and Santa Fe Railway Company, a corporation, The Western Union Telegraph Company, a corporation, The Postal Telegraph-Cable Company of New Mexico, a corporation, The Mountain States Telephone and Telegraph Company, a corporation, Maurico Montoya, Francisquita Valdez, Mrs. Julianita Valdez, Mrs. Emilia Valdez, Manuel Gutierrez, Miguel Montoya, Onesimo Valdez, Mrs. Porfilia Archebueque, Jesus Teofilo Valdez, Francisco Griego; Diego Gutierrez, Mrs. Juana Gallegos, Mrs. Genoveva Griego, Juan N. Griego, and Remedios Baca and thereupon plaintiff avers:

1. That this action is brought by the direction and under the authority of the Attorney General of the United States, and in pursuance of the requirements of the Act of Congress of June 7, 1924, entitled "An Act to Quiet Title to Lands Within Pueblo Indian Land Grants, and for other purposes."

2. That said defendants, as plaintiff is informed and believes, are citizens of the United States and of the State of New Mexico, and residents of Sandoval County in said State, except that the Most Reverend A. T. Daeger is a resident of Santa Fe County, in said State; that the Atchison, Topeka and Santa Fe Railway Company is a corporation of the State of Kansas and a citizen and inhabitant of that State; that the Western Union Telegraph Company is

a corporation of the State of New York, and a citizen and inhabitant of that State; that the Postal Telegraph-Cable Company of New Mexico is a corporation of the State of New Mexico, and a citizen and inhabitant of that State; and that The Mountain States Telephone and Telegraph Company is a corporation of the State of Colorado, and a citizen and inhabitant of that State; but that all of the aforesaid corporations are doing business in said Sandoval County and elsewhere in the State of New Mexico.

3. That the grounds upon which the Court's jurisdiction depends are, that the United States is plaintiff herein, and that this suit is authorized and directed in and by said Act of June 7, 1924.

4. That the Pueblo of Santa Ana is a community of Pueblo Indians in said Sandoval County, New Mexico; that the Indians inhabiting and comprising said Pueblo at all times mentioned herein have been and now are tribal Indians, and at all times since the treaty of Guadalupe Hidalgo have been and now are wards of this plaintiff, *non sui juris*, and incompetent to manage their own affairs; that this suit is brought by plaintiff on behalf of said Pueblo and the Indians thereof in its capacity as guardian of said Indians and their lands and possessions.

5. That more than two centuries ago the King of Spain, through his authorized representative, granted to said Pueblo of Santa Ana a tract of land situated in what is now Sandoval County in the State of New Mexico; that said grant was thereafter, and on, to-wit, the 22nd day of December, 1858, confirmed by Act of Congress; that thereafter, and on, to-wit, November 1, 1864, in pursuance of the last mentioned Act, a patent describing and delimit-

ing the lands of said grant and conveying the same to the said Pueblo in communal fee simple title, was made, executed and delivered by the United States to said Pueblo; that thereafter, and between February 18 and March 29, 1915, the exterior boundaries of said grant, as described in said patent, were retraced and resurveyed under the direction of Francis E. Joy, United States Surveyor, and that said exterior boundaries as set forth in said survey are as follows, to-wit:

SANTA ANA PUEBLO GRANT

North Boundary.

Beginning at a 3" iron post marked and described by the Surveyor General as the N. E. Corner of the Santa Ana Pueblo Grant, from which the south center quarter corner of Section 1, and the north center quarter of Section 12, T. 13 and 14 N., R. 3 E., N. M. P. M., bears south 17° E. 8.76 chains; thence S. 89° 13' W. 158.40 chains to an iron post marked 2 M. Cor.; thence N. 89° 54' W., 79.90 chains to an iron post marked 3 M. Cor.; thence N. 89° 37' iron post marked 4 M. Cor.; thence N. 0° 15' W. 96.48 N. 89° 49' W. 95.77 chains to a 3" iron post, which is the N. W. Cor. of the Santa Ana Pueblo Grant.

West Boundary.

Thence S. 0° 7' E. 415.31 chains to a 3" iron post, which is the S. W. Cor. of the Santa Ana Pueblo Grant.

South Boundary.

Thence N. 89° 43' E. 418.99 chains to a 3" iron post, which is the S. E. Cor. of the Santa Ana Pueblo Grant.

East Boundary.

Thence N. 0° 8' W. 80.45 chains to an iron post marked 1 M. Cor.; thence N. 2° 20' W. 160.76 chains to an iron post marked 3 M. Cor.; thence N. 0° 8' E. 80.22 chains to an iron post marked 4 M. Cor.; thence N. 0° 15' W. 96.48 chains to a 3" iron post, which is the N. E. Cor. of the Santa Ana Pueblo Grant and place of beginning, containing approximately 15,109.84 acres.

That the field notes of said survey are on file in the General Land Office, Washington, D. C.; the office of the Cadastral Engineer, Santa Fe, New Mexico, and the office of the Pueblo Lands Board, Santa Fe, New Mexico.

6. That ever since the eighteenth century, said Pueblo of Santa Ana has been and now is the owner in fee simple of another land in Sandoval County, New Mexico, commonly known as El Ranchito Purchase, the exterior boundaries whereof are as follows, to-wit:

Beginning at a 3" iron post marked and described by the Surveyor General as the N. E. corner of El Ranchito Grant, from which the intersection of south line between sections 12 and 13, Township 13 North, Range 4 East, N. Mex. P. M., bears S 27° 17' W. 23.08 chains, which is an iron post 1 inch in diameter with brass cap stamped:

U. S. GENERAL LAND OFFICE SURVEY

PENALTY \$250 FOR REMOVAL

T. 13 N.

S. 12 P.

S. 13 1

R. 4 E.

1916.

Thence S. 27° 17' W. along east boundary of grant 64.10 chains to A. P. or corner No. 1, east boundary; thence S. 62° 22' W., 15.84 chains to an iron post marked 1 mile corner; thence S. 62° 29' W. 2.22 chains to an iron post marked A. P. No. 2; thence S. 43° 37' W. 17.54 chains to an iron post marked A. P. No. 3; thence S. 59° 17' W. 11.11 chains to an iron post marked A. P. No. 4; thence S. 82° 38' W. 22.09 chains to an iron post marked A. P. No. 5; thence S. 42° 22' W., 14.16 chains to an iron post marked A. P. No. 6; thence S. 29° 09' W., 13.07 chains to an iron post marked 2 mile corner and A. P. No. 7; thence S. 43° 43' W., 14.80 chains to an iron post marked A. P. No. 8; thence S. 19° 09' W., 28.45 chains to an iron post marked A. P. No. 9; thence S. 32° 42' W., 35.04 chains to an iron post marked A. P. No. 10; thence S. 89° 54' W., 75.34 chains to a 3" iron post marked and described by the Surveyor General as the N. W. corner of the Felipe Gutierrez Grant and A. P. No. 11, El Ranchito Grant; thence S. 11° 48' E. 39.09 chains to an iron post marked A. P. No. 12; thence S. 40° 55' W., 9.86 chains to A. P. 13; thence S. 46° 10' W., 5.22 chains to A. P. No. 14; thence S. 31° 09' W., 9.48 chains to the S. E. corner of the El Ranchito Grant; thence S. 89° 51' W., along the S. boundary of the El Ranchito Grant and the N. boundary of the Felipe Gutierrez Grant 29.92 chains; thence N. 89° 59' W., continuing measuring 78.77 chains to the S. W. corner of El Ranchito Grant; thence N. 16° 39' E., from the S. W. corner of the El Ranchito Grant, along the W. boundary, 36.18 chains to an iron post marked A. P. No. 1; thence N. 8° 46' E., 39.44 chains to A. P. No. 2; thence N. 23° 40' E., 4.78 chains to an iron

post marked 1 mile corner W. boundary; thence N. 22° 43' E., 7.99 chains to an iron post marked A. P. No. 3; thence N. 23° 15' E., 72.41 chains to an iron post marked 2 mile corner; thence N. 19° 35' E., 2.06 chains to an iron post marked A. P. No. 4; thence N. 47° 41' E., 24.89 chains to an iron post marked A. P. No. 5; thence S. 87° 12' E., 15.38 chains to an iron post marked A. P. No. 6; thence N. 52° 13' E. 8.64 chains to an iron post marked A. P. No. 7; thence N. 15° E. 29.26 chains to an iron post marked 3 mile corner and A. P. No. 8; thence N. 28° 29' E., 51.02 chains to a 3" iron post marked and described by the Surveyor General as the N. W. corner of El Ranchito Grant and the S. W. corner of Angostura Grant; thence S. 87° E., along the north boundary of the El Ranchito Grant 96.72 chains, point for 1 mile corner at 79.92 chains, center of Rio Grande River; thence S. 81° 92' E., 19.27 chains to an iron post marked A. P. No. 2, Angostura Grant, and A. P. No. 2, El Ranchito Grant; thence S. 85° 35' E., 3.34 chains to an iron post marked A. P. No. 3; thence S. 78° 45' E., 6.77 chains to an iron post marked A. P. No. 4; thence S. 70° 15' E. 4.16 chains to an iron post marked A. P. No. 5; thence S. 74° 15' E., 18.93 chains, to an iron post marked A. P. No. 6; thence N. 89° 25' E., 11.22 chains to an iron post marked 2 mile corner; thence N. 89° 25' E., 41.19 chains to an iron post marked 2½ mile corner; thence S. 89° E. 40.02 chains to an iron post marked 3 mile corner; thence N. 89° 34' E., 13.40 chains to a 3" iron post hereinbefore described as the N. E. corner of the El Ranchito Grant and place of beginning, containing 4,945.24 acres; which said tract was confirmed to said Pueblo by decree of the Court of Private Land Claims dated March 31, 1897, and patented to said Pueblo by the United States on, to-wit,

October 18, 1909; that for more than 150 years said Pueblo of Santa Ana has been and now is the owner in fee simple of said El Ranchito Purchase and all thereof, with title and color of title, and throughout said period has been and now is in open, notorious, actual, exclusive, continuous and adverse possession of the same, and exempted and entitled to be exempted from the payment of any taxes thereon; except that the Pueblo Lands Board created by said Act of Congress of June 7, 1924, has determined that the Indian title to certain portions of said purchase has been extinguished, and that title to said portions now vests in various owners other than said Pueblo, which said portions or parcels so excepted are set forth and described by metes and bounds as Exceptions Nos. 1 to 21, on pp. 17 to 31 in the report of said Board, entitled "Pueblo Lands Board, Santa Ana Pueblo, Report on Title to Lands Granted or Confirmed to Pueblo Indians not Extinguished," filed in the office of the Clerk of this Court at Santa Fe, New Mexico, on or about July 19, 1927; that said Exceptions 1 to 21, are not involved in this suit and no relief is here asked with reference to the land included therein.

7. That ever since the eighteenth century, said Pueblo of Santa Ana has been and now is the owner in fee simple of another tract or parcel of land in Sandoval County, New Mexico, containing 29.69 acres, adjacent to said El Ranchito Purchase, but within the exterior boundaries of what is known as the Felipe Gutierrez or Bernalillo Grant; that the exterior boundaries of said 29.69 acre tract are as follows to-wit:

Beginning at a point on the south boundary of El Ranchito Grant, from which the closing corners at the in-

tersection of the south boundary of the El Ranchito Grant between Sections 20 and 21, Twp. 13 N., Rge. 4 E., N. M., P. M., bears South $89^{\circ} 58'$ west, 10.62 chains; thence South $33^{\circ} 02'$ West 17.85 chains; thence North $62^{\circ} 30'$ West 33.54 chains; thence South $89^{\circ} 58'$ east along the south boundary of El Ranchito Grant 39.72 chains to the place of beginning, containing 29.69 acres.

That for more than 150 years said Pueblo of Santa Ana has been and now is the owner in fee simple of said 29.69 acre tract and all thereof with title and color of title, and throughout said period has been and now is in open, notorious, actual, exclusive, continuous and adverse possession of the same, and exempted and entitled to be exempted from the payment of any taxes thereon.

8. And plaintiff further avers that certain of the defendants herein named claim some right or rights, title or titles, interest or interests, the exact nature, character or pretended basis whereof is unknown to plaintiff, adverse to said Pueblo and the Indians thereof, and constituting a cloud upon the title of said Pueblo and said Indians in and to portions of said El Ranchito Purchase; that the descriptions of said portions of said purchase to which the claims of said defendants attach and the names of the defendants claiming each of said portions, so far as is known to plaintiff, are specifically as follows, to-wit:

"X"

PRIVATE CLAIM NO. 18, PARCEL NUMBER 1
CHARLES F. BROWN.

Beginning at Cor. No. 1 of this claim (which is also Cor. No. 3 of P. C. 17, P. 1); thence N. $89^{\circ} 59'$ W., 3.42 chains to an iron post marked Cor. No. 2 of this claim on

the boundary of the El Ranchito Grant; thence N. 69° 11' W., along boundary of this claim 26.35 chains to an iron post marked Cor. No. 3; thence N. 4° 47' W., along boundary of this claim 1.40 chains to Cor. No. 4; thence S. 69° 02' E., along boundary common to P. C. 17 P. 1, 30.18 chains to Cor. No. 1 of this claim and place of beginning; containing 3.511 acres.

"Y"

PRIVATE CLAIM NO. 20, PARCEL NUMBER 1.
SOSTENES OR SOSTEN JARAMILLO.

Beginning at an iron post at the S. W. corner of this claim for Cor. No. 1 (from which the S. center $\frac{1}{4}$ sec. cor. bet. secs. 20 and 29 bears S. 19° 45' W., 11.66 chains dist.); thence S. 61° 39' E. along boundary of this claim 2.56 chains to an iron post, Cor. No. 2; thence S. 73° 36' E. along boundary of this claim 6.26 chains to an iron post Cor. No. 3; thence S. 68° 03' E. along boundary of this claim 3.90 chains to an iron post Cor. No. 4; thence N. 21° 15' E. along boundary of this claim 3.90 chains to an iron post, Cor. No. 5; thence N. 67° 00' W., along boundary of this claim 3.04 chains to an iron post, Cor. No. 6; thence N. 14° 00' E. along boundary of this claim .37 chains to an iron post, Cor. No. 7; thence N. 67° 07' W., along boundary of this claim 2.64 chains to an iron post, Cor. No. 8; thence N. 69° 30' W., along boundary of this claim 4.35 chains to an iron post, Cor. No. 9; thence N. 30° 00' E., along boundary of this claim 3.55 chains to an iron post, Cor. No. 10; thence N. 68° 42' W., along boundary of this claim 2.39 chains to an iron post, Cor. No. 11; thence S. 26° 35' W., along boundary of this claim 8.07 chains to Cor. No. 1 and place of beginning, containing 6.351 acres.

"Z"

PRIVATE CLAIM NO. 21, PARCEL NUMBER 1.
CATHOLIC CHURCH (Farm Land).

Beginning at an iron post, Cor. No. 1 of this claim, from which closing corner between sections 20 and 21 bears N. 89° 58' E. 11.74 chains; thence N. 65° 45' W., 6.58 chains to Cor. No. 2; thence S. 25° 57' W., 2.97 chains to Cor. No. 3; on the eastern boundary of the El Ranchito Grant; thence N. 89° 58' E., 7.22 chains to Cor. No. 1 and place of beginning, containing 0.84 A.

"Z-1"

PRIVATE CLAIM NO. 21, PARCEL NUMBER 2.
CATHOLIC CHURCH (Chapel).

Beginning at an iron post marked Cor. No. 1 of this claim from which the intersection of the S. line of section 16 and the N. line of section 21, Township 13 North, Range 4 East, bears N. 54° 45' W., .604 chains; thence N. 64° 45' W. 1.265 chains to Cor. No. 2; thence S. 24° 50' W., 0.59 chains to Cor. No. 3; thence S. 59° 30' E., 1.30 chains to Cor. No. 4; thence N. 22° 15' E., .708 chains to Cor. No. 1, and place of beginning; containing 0.83 acres.

"Z-2"

PRIVATE CLAIM NO. 17, PARCEL NUMBER 1.

VIRGINIA PEREA,
CARLOTA P. OTERO,
BARBARA PEREA YRISARRI.

Beginning at Cor. No. 1 of this claim (which is also Cor. No. 2, P. C. 16 P. 1); thence S. 89° 51' W., along boundary of the El Ranchito Grant 9.51 chains to A. P. 5 on the N. boundary of the Bernalillo Grant, and on boun-

dary of the El Ranchito Grant, to Cor. No. 2; thence N. 89° 59' W., along boundary of the El Ranchito Grant 3.21 chains to an iron post, Cor. No. 3; thence N. 69° 02' W., along boundary of this claim 30.18 chains to an iron post, Cor. No. 4; thence N. 9° 30' E., along boundary of this claim 5.57 chains to Cor. No. 5; thence S. 67° 50' E., along boundary common to P. C. 16 P. 1, 43.16 chains to Cor. No. 1 and place of beginning; containing 18.623 acres.

That the respective railway, telegraph, and telephone lines of defendants, The Atchison, Topeka and Santa Fe Railway Company, The Western Union Telegraph Company, The Postal Telegraph-Cable Company of New Mexico, and the Mountain States Telephone and Telegraph Company cross the entire El Ranchito tract in a northeasterly and southwesterly direction, and each of said defendants claims some right, title or interest in and to a right of way for its line or lines, but whether said defendants claim easements or fee titles to their respective alleged rights of way is to this plaintiff unknown.

9. That defendants Maurico Montoya, Francisquita Valdez, Mrs. Julianita Valdez, Mrs. Emilia Valdez, Manuel Gutierrez, Miguel Montoya, Onesimo Valdez, Mrs. Porfilia Archebueque, Jesus Teofilo Valdez, Francisco Griego, Diego Gutierrez, Mrs. Juana Gallegos, Mrs. Genoveva Griego, Juan N. Griego and Remedios Baca, as plaintiff is informed and believes, claim some right or rights, title or titles, interest or interests, the exact nature, character, extent or pretended basis whereof is unknown to plaintiff, adverse to said Pueblo and the Indians thereof, and constituting a cloud upon the title of said Pueblo and said Indians in and to portions of said 29.69 acre tract lying within said Felipe Gutierrez or Bernalillo Grant.

10. That the claims of all defendants herein named, whether to portions of said El Ranchito Purchase or to said 29.69 acre tract, or to any of the lands of said Pueblo of Santa Ana, are without right, and that said defendants have not, nor has any of them, any estate, right, title or interest whatsoever in or to any of said Pueblo lands, or any part thereof, other than whatever claim, right or title, if any, certain of said defendants have to the lands included within said excepted tracts numbered 1 to 21, upon said El Ranchito Purchase; that said defendants have from time to time entered upon portions of said El Ranchito Purchase to which said Board has found the Indian title to be unextinguished, and especially upon the tracts hereinabove described as tracts "X," "Y," "Z," "Z-1," and "Z-2" and committed acts of trespass thereon by using the same for occasional pasturage or cultivation and by attempting to make settlements thereon, and by surveying or attempting to survey portions thereof and by designating thereon boundaries of tracts by running furrows, driving stakes or otherwise, and threaten to continue so to do; and that other of defendants, above designated, have claimed and still claim some right, title or interest in, along with the right of possession of, said 29.69 acre tract as hereinabove stated.

11. That the Pueblo Lands Board has heretofore determined that all the lands constituting said original Pueblo Grant, said El Ranchito Purchase and said 29.69 acre tract, with the exception of the tracts above and in paragraph 6 hereof mentioned and referred to as Exceptions 1 to 21, are Indian lands, the Indian title to which has not been extinguished, as shown by the Board's report filed in this Court on or about, to-wit: July 19, 1927;

and that said Board has specifically determined that the land comprised in the tracts and parcels hereinabove and in paragraph 8 hereof specifically described, is Indian land, the Indian title to which has not been extinguished, as shown by said report of said Board.

12. That many of the defendants above named possess and other of said defendants claim to possess alleged deeds and other instruments of writing purporting to convey to them or to their grantors immediate or remote, and through inheritance or mesne conveyances to said defendants, the premises above described as Indian lands, the Indian title to which has not been extinguished; that many of said deeds and other instruments have been placed on record in the office of the County Clerk of Sandoval County, New Mexico, and that defendants threaten similarly to record the remainder of said deeds or instruments in the office of said County Clerk; that some of said alleged deeds and instruments of conveyance purport to be given by the Pueblo of Santa Ana, others by individual Indians thereof, and others by non-Indian intruders upon said Pueblo lands; and that each and all of said deeds and instruments are null and void, either because not given by the governing authorities of said Pueblo, or as not having been given prior to January 6, 1912, or as being given by a Pueblo incompetent to convey; or by incompetent Indians *non sui juris* and wards of this plaintiff, or by non-Indians owning none of and possessing no title to any land of said Pueblo, and having no right to convey the same, or for other reasons; that by reason of the foregoing, the title of said Pueblo of Santa Ana and the Indians thereof to the land hereinabove described has been and is clouded, and will be further clouded and rendered uncertain; that said deeds

and instruments are in possession of defendants, and that their contents, the circumstances of their procurement and execution, the identity and status of the parties thereto, and all facts relevant to their invalidity and to the allegations of this paragraph are within the knowledge of said defendants and more within their knowledge than within the knowledge of plaintiff.

13. That the claims of said defendants are all subordinate to the single title and right of said Pueblo and cast a cloud upon its title and possession, and threaten to exclude said Pueblo and the Indians thereof from the peaceable enjoyment of the lands hereinabove averred to be owned by it.

That damages at law are inadequate to remedy or compensate for the injuries herein set forth; that the right and title of said Pueblo of Santa Ana to the lands owned by it, as above averred, can not be enforced at law without a multiplicity of suits all involving the same questions and the consideration of the same statutes, either of the United States or of the State or former Territory of New Mexico; that the right of said Pueblo and the Indians thereof to protection against the trespasses of defendants continuing and threatening to continue as aforesaid, and the removal of the cloud existing by reason of the alleged deeds and instruments aforesaid can only be adequately enforced in equity.

That, in addition to the claims of defendants involved in this suit, and attaching to the lands of the Pueblo of Santa Ana, between 3,500 and 4,000 similar claims of other persons are in existence and attach to the patented and other lands of the Pueblos in the State of New Mexico

held under titles similar to that of the Pueblo of Santa Ana; that this Court will be required to pass on many of said additional adverse claims under the requirements of said Pueblo Lands Act of June 7, 1924; and that, unless the United States shall be permitted to join as defendants in its bill to quiet title to the lands of each Pueblo, the numerous claimants thereto, against each of whom it has a like cause of action, and against each of whom it seeks the same relief, and whose pretended claims are based upon similar facts, and involve the same questions of law, it will be driven to bring a great number of distinct and separate actions; and that it will be practically impossible for the United States to prosecute and for the Court to adjudicate and dispose of so large a number of separate and distinct suits within any reasonable length of time; that, by reason of the matters and things aforesaid, plaintiff and said Pueblo have no plain, adequate or complete remedy at law.

WHEREFORE, plaintiff prays that said defendants and each of them be required to disclose and set forth the facts and nature of any claim or claims whatsoever made or asserted by them adverse to the claim, right, and title of said Pueblo of Santa Ana, as aforesaid; and that thereupon it may be adjudged and decreed that any and all right, title or interest claimed or asserted by said defendants, or any of them, in or to or upon the lands and premises hereinabove averred to be owned by said Pueblo of Santa Ana and the Indian title whereto has heretofore been found by said Pueblo Lands Board to be unextinguished, may be adjudged and decreed to be null and void, and that it be adjudged and decreed that said defendants have not, nor has any of them any estate, right,

title, or interest whatsoever in or to said land and premises; that the title to said premises and all thereof may be quieted in said Pueblo; that an injunction may issue perpetually enjoining and restraining defendants, and all of them, and their agents and representatives from further asserting any right, title or interest in or to said Indian lands above described, and from trespassing thereon or interfering with the full possession and control thereof by said Pueblo of Santa Ana; that any and all alleged deeds or instruments of conveyance or inheritance of any sort or description in the possession or under the control of said defendants or any of them, and purporting to convey, devise or affect the title of the premises hereinabove described as being claimed by said defendants, or any part of said premises or interest therein, may, insofar as they cover, convey or concern said premises, be decreed to be null and void and of no effect as against plaintiff or said Pueblo of Santa Ana or the Indians thereof; and that said defendants be ordered to surrender said deeds or instruments to the Court for cancellation; and that plaintiff may have such other and further relief as to the Court may seem proper.

GEORGE A. H. FRASER
Special Assistant to the
Attorney General,
C/O Pueblo Lands Board,
Santa Fe, New Mexico,
Attorney for Plaintiff.

MARSHAL'S RETURN

UNITED STATES OF AMERICA)
) SS:
 DISTRICT OF NEW MEXICO)

I, Joseph F. Tondre, United States Marshal for the District of New Mexico, hereby certify that the within writ came to hand on the 15th day of December A. D. 1927, and that same was duly executed by delivering to the within named defendants on the dates, at the places and in the manner mentioned in the list attached hereto, a true copy of the within writ, together with a copy of the complaint thereto attached at places indicated in list attached hereto in Sandoval County, State of New Mexico.

WITNESS my hand this 30th day of December, 1927.

Joseph F. Tondre
 Marshal

By /s/ Daniel Padillo
 Deputy Marshal

MARSHAL'S FEES

Service person at \$2.00 each — \$.....

Mileage miles at 12¢, (going only)

.....
 Total.....

No. 1814 Equity

UNITED STATES DISTRICT COURT
 DISTRICT OF NEW MEXICO
 Sitting at Santa Fe

In Chancery

U. S. A. as Guardian of the Pueblo of Santa Ana, in
 the State of New Mexico

vs.

Charles F. Brown, et al.

SUBPOENA

ORIGINAL

George A. H. Fraser, Esq.,
 Denver, Colo.

Solicitor for Complainant

MARSHAL'S RETURN

UNITED STATES OF AMERICA)
) SS:
 DISTRICT OF NEW MEXICO)

I, _____, 192....
 United States Marshal for the District of New Mexico, hereby certify that the within writ came to hand on the _____ day of _____ A. D. 192 , and that after diligent search I was unable to find the within-named person _____ within my district.

Witness my hand this _____ day of _____ A. D. 192...

 Marshal.

By _____
 Deputy Marshal.

_____ \$_____

EXHIBIT "B" TO ANSWER
IN THE DISTRICT COURT
UNITED STATES OF AMERICA
DISTRICT OF NEW MEXICO

No. 1814

In Equity

United States of America as Guardian of the Pueblo
of Santa Ana in the State of New Mexico,

Plaintiff

v.

Charles F. Brown, et al.,

Defendants

MOTION TO DISMISS

Comes now the plaintiff above named by its attorney
and moves that the Bill of Complaint herein be dismissed
as to defendant, the Mountain States Telephone & Tele-
graph Company, a corporation, and for grounds of this
motion plaintiff says:

That subsequent to the institution of this suit said de-
fendant has obtained a deed from the Pueblo of Santa Ana
approved April 13, 1928, by the Secretary of the Interior
in accordance with Section 17 of the Pueblo Lands Act of
June 7, 1924, and that thereby said defendant has obtained,
for an adequate consideration, good and sufficient title to
the right of way in controversy herein between plaintiff
and said defendant.

/s/ George A. H. Fraser
Spec. Asst. to Attorney General
Attorney for Plaintiff.

EXHIBIT "C" TO ANSWER
IN THE DISTRICT COURT
UNITED STATES OF AMERICA
DISTRICT OF NEW MEXICO

No. 1814

In Equity

United States of America as Guardian of the Pueblo
of Santa Ana in the State of New Mexico

Plaintiff

v.

Charles F. Brown, et al.,

Defendants

ORDER OF DISMISSAL

This cause coming on to be heard upon plaintiff's
Motion to dismiss as to defendant, the Mountain States
Telephone & Telegraph Company, a corporation, and it ap-
pearing to the court that since the institution of this suit
said defendant has secured good and sufficient title to the
right of way and premises in controversy herein between
plaintiff and said defendant by deed from the Pueblo of
Santa Ana approved April 13, 1923, by the Secretary of
the Interior in accordance with the provisions of Section
17 of the Pueblo Lands Act of June 7, 1924,

IT IS HEREBY ORDERED that this suit be, and it
is hereby, dismissed as to said defendant.

Given at Santa Fe, New Mexico, this 31st day of May,
A. D. 1928.

BY THE COURT
/s/ Colin Neblitt
Judge

EXHIBIT "D" TO ANSWER

THIS AGREEMENT, Made this 23 day of February, A. D. 1928, between PUEBLO De SANTA ANA, a New Mexico corporation, by Emiliano Otero, Governor of Pueblo de Santa Ana, Jose Rege Leon, Lieutenant Governor of Pueblo Santa Ana, Cursito Loretto, Captain of Pueblo de Santa Ana, Jose Profina, Lieutenant of Pueblo de Santa Ana, ———, of Pueblo de Santa Ana, and Jose Martine, Fiscal of Pueblo de Santa Ana, party of the first part, and THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a Colorado corporation, party of the second part,

WITNESSETH :

THAT, WHEREAS, the party of the first part is the owner of certain land situated in the County of Sandoval, New Mexico, which is known as El Ranchito Grant, and which forms a part of the Santa Ana Pueblo Grant, and is included within the boundaries of the Pueblo de Santa Ana; and

WHEREAS, the party of the second part desires to construct, maintain and operate a telephone and telegraph line over, across, through and under the said land at the location hereinafter described; and

WHEREAS, the party above named and designated as the party of the first part herein is a corporation created under the laws of the State of New Mexico, and the persons executing this agreement on behalf of the said party of the first part are the governing officials of the said party of the first part, with full power and authority to execute instruments conveying easements and rights of

way across the lands owned and controlled by the said party of the first part in New Mexico, subject, however, to the approval of the Secretary of the Interior; and

WHEREAS, it is the desire of the party of the first part to execute, for itself and on behalf of the inhabitants thereof, an instrument granting to the party of the second part the right, privilege and authority to construct, maintain and operate a telephone and telegraph pole line, including the necessary poles, cables, conduits, wires and fixtures, with the right to permit the attachment of the wires of any other party, and the right to trim any trees along said lines so as to keep the wires cleared at least forty-eight (48) inches, and to set the necessary guy and brace poles and anchors, and to attach thereto the necessary guy wires, over, along, under and across those certain lands situated within the boundaries of the Pueblo de Santa Ana, State of New Mexico, and particularly across what is sometimes known as El Ranchito Grant, the exact location of which is herein more specifically described.

NOW, THEREFORE, in consideration of the premises, and the further consideration of One Hundred One and 60/100 Dollars (\$101.60), and other good and valuable considerations in hand paid to the party of the first part by the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part, for itself and on behalf of the inhabitants of the Pueblo de Santa Ana, does hereby grant, bargain and sell unto the party of the second part, its successors and assigns, an easement to construct, maintain and operate a telephone and telegraph pole line, including the necessary poles, cables, conduits, wires and fixtures, with the right to permit the attachment of the wires of any other party, and the right to

trim any trees along said lines so as to keep the wires cleared at least forty-eight (48) inches, and to set the necessary guy and brace poles and anchors, and to attach thereto the necessary guy wires, over, along, under and across the following described property known as El Ranchito Grant, a part of the Santa Ana Pueblo in the County of Sandoval, State of New Mexico, the location of said right of way being more particularly described as follows:

Beginning at a point on the south boundary of El Ranchito Grant, Section Twenty-one (21) Township Thirteen (13) North, Range Four (4) East, from which point the three and one-half mile corner bears north 89° 58' east 1389.5 feet; thence in a general northeasterly direction across El Ranchito Grant to the north boundary of said grant, from which point the northeast corner of El Ranchito Grant bears south 89° 00' east 2773.1 feet, a total distance of 2.988 miles. (The exact location of said right of way is shown on the map hereto attached and made a part hereof.) [No map was presented to the Tenth Circuit.]

It is understood that only an easement for the construction and maintenance of a telephone and telegraph line, and the fixtures thereto attached, is hereby granted, and that the party of the first part, and the inhabitants of said Pueblo, retain the right to cultivate said land, or to otherwise use it in any manner whatsoever, provided such cultivation or use thereof does not interfere with the construction, maintenance and operation of the said telephone and telegraph line, and the fixtures thereon.

It is understood that the party of the second part, its successors and assigns, shall have the right of ingress, egress and regress to do any and all work necessary to properly maintain and operate said line or lines.

IN WITNESS WHEREOF, the said party of the first part has caused this instrument to be executed by its duly authorized officers, for itself and on behalf of the inhabitants of said Pueblo de Santa Ana, New Mexico, and the party of the second part has caused this instrument to be executed by its duly authorized officers the day and year first above written.

PUEBLO De SANTA ANA,

By Emiliano Otero
Its Governor

By Jose Reye Leon
Its Lieutenant Governor
(His Mark)

By Crusito Loretto
Its Captain (His Mark)

By Jose Profinio
Its Lieutenant (His Mark)

By Jose Martine
Its Fiscal (His Mark)
Party of the First Part,

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,

By /s/ H. E. McAfee
Its Vice President,
Party of the Second Part.

Attest:

/s/ (Illegible)
Secretary.

STATE OF NEW MEXICO,)
) SS.
COUNTY OF SANDOVAL)

On this 23 day of February, 1928, before me appeared Emiliano Otero, Jose Rege Leon, Cristo Loretto, Jose Profinio, and Jose Martine, to me personally known, who, being by me duly sworn, did say that they are the Governor, Lieutenant Governor, Captain, Lieutenant, and Fiscal of the Pueblo de Santa Ana, New Mexico, respectively; and that the said instrument was signed by them on behalf of the said Pueblo de Santa Ana, and the inhabitants thereof, by authority of its Board of Principals made and provided, and the said Emiliano Otero, Jose Rege Leon, Cristo Loretto, Jose Profinio, and Jose Martine acknowledged said instrument to be the free act and deed of the said Pueblo de Santa Ana, and their free act and deed, and that the said Pueblo de Santa Ana has no corporate seal, and that said instrument has been read and interpreted to each of them, and that each of them knows the contents thereof.

Given under my hand and notarial seal this 23 day of February, A. D. 1928.

My commission expires July 8, 1931.

/s/ Al. Matthieu
Notary Public.

STATE OF COLORADO,)
) SS.
City and County of Denver.)

On this 23d day of March, 1928, before me appeared H. E. McAfee, to me personally known, who, being by me duly sworn, did say that he is the Vice President of The Mountain States Telephone and Telegraph Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was

signed and sealed on behalf of said corporation by authority of its Board of Directors, and that said H. E. McAfee acknowledged said instrument to be the free act and deed of said corporation.

Given under my hand and notarial seal this 23d day of March, A. D. 1928.

My commission expires December 7, 1930.

/s/ Lillian F. Levitt
Notary Public.

DEPARTMENT OF THE INTERIOR

April 13, 1928.

APPROVED, pursuant to the provisions of Section 17 of the Act of June 7, 1924 (43 Stat. L. 636).

/s/ John H. Edwards
Assistant Secretary

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

(Title Omitted in Printing)

MOTION TO STRIKE AFFIRMATIVE DEFENSES AND FOR PARTIAL JUDGMENT ON THE PLEADINGS

(Filed March 30, 1931)

Plaintiff, by and through its counsel, moves the Court, pursuant to Rule 12(f), F.R.Civ.P., for an order striking defendant's First, Second, Third, Fourth, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fifteenth, Seventeenth and Nineteenth Affirmative Defenses, or, alternatively, for partial judgment on the pleadings pursuant to

Rule 12(c), F.R.Civ.P., and as grounds therefore states as follows:

1) Each of the above-enumerated Affirmative Defenses is, on its face, insufficient as a matter of law to bar plaintiff's claim.

2) None of the Affirmative Defenses listed presents substantial or disputed questions of fact.

3) The Affirmative Defenses listed will, if not stricken, unnecessarily confuse the issues herein and burden the plaintiff and will substantially prejudice plaintiff's ability to present its case.

4) Affirmative Defenses Numbers One and Three are not accompanied by a supporting memorandum as required by Local Rule 5(c) and (d).

5) As to the Third Affirmative Defense, to which a motion to strike technically may not be appropriate, there is no controverted question of fact and plaintiff is entitled to judgment on this issue as a matter of law.

6) These and other reasons are more fully set forth in the accompanying memorandum, which is incorporated herein by reference.

Concurrence of opposing counsel has not been sought herein, as it is assumed such concurrence would be refused.

Respectfully submitted,

LUEBBEN, HUGHES & KELLY
805 Tijeras, NW
Albuquerque, NM 87102
(505) 842-6123

By /s/ John J. Kelly
Attorneys for Plaintiff

(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Title Omitted in Printing)

MINUTE ORDER

(Filed April 15, 1981)

BY DIRECTION OF THE COURT:

It is ORDERED that plaintiff's Motion to Strike Affirmative Defenses be, and the same hereby is, DENIED.

/s/ Jesse Casaus
Clerk

/s/ Rita Guigo
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Title Omitted in Printing)

O R D E R

(Filed July 23, 1981)

This matter comes on for consideration on plaintiff's motion to alter my order of April 15, 1981 to allow an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) (1976). Having considered plaintiff's motion and defendant's response, I find that the motion is not well taken and should be denied.

The order which plaintiff requests appeal from denied plaintiff's motion to strike several of defendant's affirmative defenses. I will alter that order to strike defendant's

affirmative defenses numbered one, two and three. Defendant has conceded the unavailability of those defenses in this law suit. The facts of this case must be developed further to determine the applicability of defendant's affirmative defense number four. The remaining affirmative defenses which I declined to strike raise equitable defenses under state law. Plaintiff argues the defenses are unavailable because of the Indian Non-Intercourse Act of June 30, 1834, 25 U.S.C. § 177 (1976). Defendant argues the Act had no application to Pueblo Indians when defendant's predecessor constructed its telephone line and that state equitable defenses are specifically authorized by the Pueblo Lands Act of 1924. 43 Stat. 636.

Plaintiff has not addressed these arguments and I have not decided whether the defenses are available to defeat plaintiff's claims. Appeal would be premature. Now, Therefore,

IT IS ORDERED that my order of April 15, 1981 shall be, and hereby is amended to strike defendant's affirmative defenses numbered one, two and three.

IT IS FURTHER ORDERED that plaintiff's motion to certify an interlocutory appeal shall be, and hereby is, denied.

/s/ E. L. Mechem
United States District Judge

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

(Title Omitted in Printing)

MOUNTAIN BELL'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

(Filed December 30, 1981)

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, The Mountain States Telephone and Telegraph Company (Mountain Bell) moves the Court for a Partial Summary Judgment denying and dismissing the Plaintiff's claims for trespass for the period 1928 to date.

There are two (2) independent grounds for this motion, each of which is sufficient for the granting of the motion:

1. The Defendant is not a trespasser for the reason that the Plaintiff granted to the Defendant an easement or right to construct and maintain the telephone line that is the subject of this suit by an Agreement dated February 23, 1928 between the Plaintiff and Defendant and approved by the Secretary of the Interior on April 13, 1928 pursuant to § 17 of the Act of June 7, 1928 (43 Stat.L. 636).

2. The Plaintiff's claims for trespass are barred by reason of a prior suit between Plaintiff and Defendant brought to adjudicate Mountain Bell's rights to construct and maintain the subject telephone line, from which suit Mountain Bell was dismissed by an order of court dated May 31, 1928 which found that Mountain Bell had, since the institution of the suit, "... secured good and sufficient title to the right-of-way and premises".

For purposes of this motion, there is no genuine issue as to any material fact and Mountain Bell is entitled to the partial summary judgment as a matter of law, all as more fully set forth in the memorandum filed in support of this motion.

The concurrence of opposing counsel to this motion was not requested because it is assumed that Plaintiff opposes the motion.

/s/ Stuart S. Gunckel

/s/ John R. Stoller

Suite 1300, 931-14th Street
Denver, Colorado 80202
(303) 624-2200

H. PERRY RYON
Plaza Campana
P. O. Box 400
Station 733
Albuquerque, New Mexico 87103-400
(505) 765-5621

Attorneys for The Mountain States
Telephone and Telegraph Company

Address of Mountain Bell:

Plaza Campana
P. O. Box 400
Station 733
Albuquerque, New Mexico 87103-400

(Certificate of Mailing Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

(Title omitted in printing)

A P P E N D I X

TO

MOUNTAIN BELL'S MEMORANDUM IN SUPPORT
OF MOTION FOR PARTIAL SUMMARY JUDGMENT
(Filed December 30, 1981)

STUART S. GUNCKEL

JOHN R. STOLLER

Suite 1300, 931-14th Street
Denver, Colorado 80202
(303) 624-2200

H. PERRY RYON

Plaza Campana
P. O. Box 400
Station 733
Albuquerque, New Mexico 87103-400
(505) 765-5621

Attorneys for The Mountain States
Telephone and Telegraph Company

Address of Mountain Bell:

Plaza Campana
P. O. Box 400
Station 733
Albuquerque, New Mexico 87103-400

I

(Statutes omitted in printing.)

II

(Material regarding 1927 Action omitted in printing.
Material can be found at J.A. 14-43.)

III

INTERROGATORY ANSWERS

1. Interrogatory No. 7
2. Interrogatory No. 8
3. Interrogatory No. 9
4. Interrogatory No. 10
5. Interrogatory No. 14

INTERROGATORY NO. 7

Describe the facts and circumstances and reasons upon which you rely to support your contention that the Plaintiff is an Indian Tribe recognized by the United States; identify all documents which pertain or relate to that contention.

ANSWER:

The Pueblo of Santa Ana has historically been recognized as a dependent Indian community by the United States of America. This recognition and the resulting trust relationship is documented in the attached "Exhibit B", which is a listing of tribal governments recognized by the United States as of April 24, 1980, 45 Fed.Reg. 27828.

INTERROGATORY NO. 8

Describe the El Ranchito Grant and the history of the Plaintiff's claims to and interests in the lands involved in this suit; and describe all steps taken and identify all proceedings pursued to assert such claims and interests, including the dates that such steps and proceedings were taken and the results and conclusions of those steps and proceedings. Identify all documents which pertain to or relate to the Plaintiff's claims and interests and the steps and proceedings pursued.

ANSWER:

El Ranchito was purchased by the Pueblo of Santa Ana in five transactions between the years 1709 and 1763. See Exhibit A, pages 31, 39-42. Copies of the deeds with descriptions will be furnished as soon as they become available. A patent to El Ranchito was issued in 1909

pursuant to a determination as to title made by the Court of Private Land Claims in 1900. The patent is included in Plaintiff's response to the document request.

INTERROGATORY NO. 9

Identify the person who holds legal title to the lands alleged to be involved in the trespass claim of the Plaintiff against the Defendant and state the date the person acquired title. Identify the documents which relate or pertain to the legal title and the person holding it.

ANSWER:

Title to El Ranchito is held by the Pueblo of Santa Ana in fee simple, subject to the federal trusteeship. No individual person or persons has title. The federal trust prohibits alienation of the land or any interest therein without consent of the United States. Title to El Ranchito was obtained by deed to the Pueblo of Santa Ana in three separate transactions, dating between 1709 and 1763. These transactions are more fully set out in the deeds and in the decision of the Court of Private Land Claims, entitled *Pueblo of Santa Ana and the inhabitants thereof v. United States*, No. 157, which was filed on May 31, 1897 and finalized on December 7, 1900. A patent from the United States to the Pueblo of Santa Ana was subsequently issued pursuant to that decision, which patent is dated October 18, 1909. The patent encompasses the same lands as were deeded to the Pueblo in the 1700's. All of the documents relevant to these transactions are provided in attachments hereto, or will be provided as soon as they are available to plaintiff. The originals of the deeds are in the Archives of the State of New Mexico.

INTERROGATORY NO. 10

Did the Pueblo of San Felipe or any other person ever claim title to or an interest in the lands which are involved in this suit? If so, as to each such claim:

- (a) Identify the persons who made the claim;
- (b) Describe the claim made;
- (c) State the date that the claim was made;
- (d) State the manner in which the claim was made;
- (e) Describe the lands and the portion of the telephone line across those lands which were involved in the claim;
- (f) Identify any legal or administrative proceedings involving the claim; and
- (g) Describe the resolution and current status of the claim.

ANSWER:

No

INTERROGATORY NO. 14

At any time since 1904, has the Plaintiff or anyone else notified or informed Mountain Bell that the telephone line across the lands claimed by the Plaintiff trespassed upon or was on the land without authority or legal right to be there? If so:

- (a) State each date when Mountain Bell was so notified;
- (b) Identify the persons notifying Mountain Bell;
- (c) Identify all persons at Mountain Bell who were so notified;
- (d) Identify all documents which indicate or relate to such notification or lack thereof.

ANSWER:

Plaintiff at this time knows of no specific instance when defendant was given notice that it was trespassing on plaintiff's land, other than in the quiet title action filed in 1927 known as "The United States of America, as guardian of the Pueblo of Santa Ana, in the State of New Mexico, Plaintiff, versus Charles F. Brown, *et al.*, Defendants, No. 1814 in equity, in the United States District Court, District of New Mexico."

 IV

 RESPONSE TO REQUEST
FOR ADMISSIONS

1. Plaintiff's Responses to Defendants Request for Admissions (First Set)

(Title omitted in printing)

 PLAINTIFF'S RESPONSE TO DEFENDANT'S
REQUEST FOR ADMISSIONS (FIRST SET)

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, the Plaintiff responds to the Defendant's Request for Admissions as follows:

REQUEST FOR ADMISSIONS NO. 1:

The telephone line involved in this suit was removed on March 21 to 31, 1980, and no longer traverses the lands claimed by the Plaintiff.

RESPONSE TO REQUEST NO. 1:

Plaintiff has no knowledge of the facts stated in this request, and thus cannot admit or deny them except to say that from visual inspection the pole line appears at the present time to be absent from its previous location.

REQUEST FOR ADMISSIONS NO. 2:

The agreement dated February 23, 1928 between Pueblo de Santa Ana and Mountain Bell, a copy of which is attached as Exhibit "D" to the Defendant's Answer, was signed by and on behalf of the Pueblo de Santa Ana.

RESPONSE TO REQUEST NO. 2:

Plaintiff admits that the document appears to have been signed or thumbprinted by officers of the Pueblo. Plaintiff has no knowledge of the circumstances surrounding the execution of the document or whether the officers acted with proper authority, beyond what is stated in the document itself, and all persons with such knowledge are deceased; Plaintiff is thus unable in good faith to admit or deny the balance of this request. Plaintiff assumes, however, that the officers acted with such authority as they possessed.

REQUEST FOR ADMISSIONS NO. 3:

The agreement dated February 23, 1928 between Pueblo de Santa Ana and Mountain Bell, a copy of which is attached as Exhibit "D" to the Defendant's Answer, was approved by the Department of Interior on April 13, 1928.

RESPONSE TO REQUEST NO. 3:

Plaintiff admits that the agreement was signed by a Mr. John H. Edwards on behalf of the Department of the Interior, on or about April 13, 1928. Whether or not that constitutes "approval", Plaintiff believes, calls for a legal conclusion, and to that extent the Request is objected to.

REQUEST FOR ADMISSIONS NO. 4:

The persons who signed for and behalf of the Pueblo de Santa Ana, the agreement dated February 23, 1928 between Pueblo de Santa Ana and Mountain Bell, a copy of which is attached to the Defendant's Answer as Exhibit "D", had the power and authority to execute the agreement on behalf of the Pueblo de Santa Ana.

RESPONSE TO REQUEST NO. 4:

As stated in Response to Request No. 2, Plaintiff has no knowledge as to whether the persons who executed the document acted with proper authorization from the tribe, and there is no way to determine whether they did. Plaintiff assumes, however, that they acted with such authority as they possessed.

REQUEST FOR ADMISSIONS NO. 5:

The Department of Interior had the power and authority to approve the agreement dated February 23, 1928

between Pueblo de Santa Ana and Mountain Bell, a copy of which is attached as Exhibit "D" to the Defendant's Answer.

RESPONSE TO REQUEST NO. 5:

This Request is objected to on the grounds that it asks for a bare legal conclusion.

REQUEST FOR ADMISSIONS NO. 6:

The agreement dated February 23, 1928 between Pueblo de Santa Ana and Mountain Bell, a copy of which is attached as Exhibit "D" to the Defendant's Answer, was and is legal, valid and binding on the Plaintiff.

RESPONSE TO REQUEST NO. 6:

This Request is objected to on the grounds that it asks for a bare legal conclusion.

REQUEST FOR ADMISSIONS NO. 7:

The agreement dated February 23, 1928 between Pueblo de Santa Ana and Mountain Bell, a copy of which is attached as Exhibit "D" to the Defendant's Answer, pertains to and involves the same telephone line and lands of the Plaintiff which are the subject of the case at bar and, further, the subject telephone line across the lands claimed by the Plaintiff was not rerouted or relocated subsequent to the execution of the agreement and prior to the removal of the poles in 1980.

RESPONSE TO REQUEST NO. 7:

Plaintiff assumes that the document refers to the same line that is the subject of this action. Plaintiff has no

knowledge that the line was ever rerouted or relocated or of any facts pertaining to its removal, but cannot in good faith admit or deny the portion of this Request pertaining thereto.

REQUEST FOR ADMISSIONS NO. 8:

The Plaintiff was a party to or represented in the lawsuit, The United States of America, as Guardian of the Pueblo of Santa Ana, in the State of New Mexico, Plaintiff, versus, Charles F. Brown, et al, Defendants, No. 1814 in equity in the United States District Court, District of New Mexico.

RESPONSE TO REQUEST NO. 8:

Denied.

REQUEST FOR ADMISSIONS NO. 9:

The Mountain States Telephone and Telegraph Company was a party to the lawsuit, The United States of America, as Guardian of the Pueblo of Santa Ana, in the State of New Mexico, Plaintiff, versus, Charles F. Brown, et al, Defendants, No. 1814 in equity in the United States District Court, District of New Mexico.

RESPONSE TO REQUEST NO. 9:

Admitted.

REQUEST FOR ADMISSIONS NO. 10:

The Plaintiff claimed in the lawsuit, The United States of America, as Guardian of the Pueblo of Santa

Ana, in the State of New Mexico, Plaintiff, versus, Charles F. Brown, et al, Defendants, No. 1814 in equity in the United States District Court, District of New Mexico, that Mountain Bell had no right or interest in and trespassed on the property of Pueblo of Santa Ana with the same telephone line which is involved in the instant case.

RESPONSE TO REQUEST NO. 10:

Denied.

REQUEST FOR ADMISSIONS NO. 11:

In the lawsuit, The United States of America, as Guardian of the Pueblo of Santa Ana, in the State of New Mexico, Plaintiff, versus, Charles F. Brown, et al, Defendants, No. 1814 in equity in the United States District Court, District of New Mexico, the Plaintiff moved to dismiss Mountain Bell from the suit for the reason that, subsequent to the institution of that suit, Mountain Bell had obtained, for an adequate consideration, good and sufficient title to the right-of-way in controversy herein between Plaintiff and Defendant.

RESPONSE TO REQUEST NO. 11:

Denied.

REQUEST FOR ADMISSIONS NO. 12:

In the lawsuit, The United States of America, as Guardian of the Pueblo of Santa Ana, in the State of New Mexico, Plaintiff, versus, Charles F. Brown, et al, Defendants, Action No. 1814 in equity in the United

States District Court, District of New Mexico, on May 31, 1928, the court dismissed Mountain Bell from the suit for the reason that, since the institution of the suit, Mountain Bell had secured good and sufficient title to the right-of-way and premises in controversy herein between Plaintiff and Defendant.

RESPONSE TO REQUEST NO. 12:

Plaintiff admits that Mountain Bell was dismissed from the referenced action, but has no information on and cannot ascertain the motivation behind such dismissal other than what appears in the order of dismissal.

REQUEST FOR ADMISSIONS NO. 13:

By reason of the claims, motion to dismiss and findings and order of the court in the lawsuit, The United States of America, as Guardian of the Pueblo of Santa Ana, in the State of New Mexico, Plaintiff, versus, Charles F. Brown, et al, Defendants, Action No. 1814 in equity in the United States District Court, District of New Mexico, the trespass claims of the Pueblo de Santa Ana in the case at bar are barred by collateral estoppel or res judicata.

RESPONSE TO REQUEST NO. 13:

This Request is objected to on the grounds that it asks for a bare legal conclusion.

REQUEST FOR ADMISSIONS NO. 14:

The lawsuit The United States of America, as Guardian of the Pueblo of Santa Ana, in the State of New

Mexico, Plaintiff, versus, Charles F. Brown, et al, Action No. 1814 in equity in the United States District Court, District of New Mexico, pertains to and involves the same telephone line and lands of the Plaintiff which are the subject of the case at bar and, further, the subject telephone line across the lands claimed by the Plaintiff was not rerouted or relocated subsequent to Mountain Bell's dismissal from the lawsuit and prior to the removal of the poles in 1980.

RESPONSE TO REQUEST NO. 14:

Plaintiff cannot in good faith admit or deny that the referenced action pertained to or involved the same line as is the subject of the instant litigation, inasmuch as the complaint does not provide any particulars as to Mountain Bell's involvement and Plaintiff cannot ascertain with any certainty what was intended thereby. As to the question of rerouting or relocation of the line, Plaintiff incorporates herein its Response to Request No. 7.

REQUEST FOR ADMISSIONS NO. 15:

The Pueblo of Santa Ana knew of the construction, existence, use, service or maintenance of the telephone line across the Plaintiff's property:

- (a) In 1905;
- (b) Prior to 1927;
- (c) On February 23, 1928;
- (d) On May 31, 1928;
- (e) Since May 31, 1928.

RESPONSE TO REQUEST NO. 15:

Plaintiff has no knowledge of what its officers or members knew at any of the times specified prior to 1928. In more recent years, Plaintiff has certainly known of the existence of the line and has generally assumed the line was in service and use, and from time to time maintained by the Defendant. To this extent paragraph (e) is admitted.

REQUEST FOR ADMISSION NO. 16:

It would be unreasonable [sic; original REQUEST said "reasonable"] for Mountain Bell to believe, and Mountain Bell would be justified in believing that, after the order of dismissal dated May 31, 1928, in the lawsuit The United States of America, as Guardian of the Pueblo of Santa Ana, in the State of New Mexico, Plaintiff, versus, Charles F. Brown, et al, Defendants, Action No. 1814 in equity in the United States District Court, District of New Mexico, Mountain Bell had the right to maintain, use, service, and operate the telephone line across the lands claimed by the Plaintiff.

RESPONSE TO REQUEST NO. 16:

This Request is objected to on the grounds that it asks for a bare legal conclusion. To the extent that the Request may ask for opinions of fact or of the application of law to fact, it is denied.

REQUEST FOR ADMISSION NO. 17:

It would be unreasonable for Mountain Bell to believe, and Mountain Bell would be justified in believing

that, after the execution by Pueblo de Santa Ana and Mountain Bell, of the agreement dated April 13, 1928, and approval of that agreement by the Secretary of the Interior on April 13, 1928, Mountain Bell had the right to maintain, use, service and operate the telephone line across the property claimed by the Plaintiff.

RESPONSE TO REQUEST NO. 17:

This Request is objected to on the grounds that it asks for a bare legal conclusion. To the extent that the Request may ask for opinions of fact or of the application of law to fact, it is denied.

REQUEST FOR ADMISSIONS NO. 18:

The telephone line which is the subject of this suit served the Plaintiff, or its members, or occupants of lands owned by the Plaintiff.

RESPONSE TO REQUEST NO. 18:

Plaintiff has no knowledge as to what lands or persons are or may have been served by the line in question, and thus at the present time cannot admit or deny this Request. Plaintiff will, however, attempt to obtain this information through discovery from Defendant.

/s/ RICHARD W. HUGHES
LUEBBEN, HUGHES & KELLY
805 Tijeras, NW
Albuquerque, NM 87102
(505) 842-6123

Attorneys for Pueblo of Santa
Ana, Plaintiff

Date: March 30, 1981

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

(Title Omitted in Printing)

APPENDIX OF EXHIBITS

TO

RESPONSE OF THE PUEBLO OF SANTA ANA TO MOUNTAIN BELL'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(Filed February 1, 1982; docketed March 29, 1982)

EXHIBITS

Affidavit of Omar Bradley. February 1, 1982.

- Exhibit A — (Omitted in printing; can be found at J.A. 36.)
- Exhibit B — George A.H. Fraser to Milton Smith, Jr., March 10, 1928.
- Exhibit C — Milton Smith, Jr., to George A.H. Fraser, March 12, 1928.
- Exhibit D — Milton Smith, Jr., to George A.H. Fraser, May 23, 1928.
- Exhibit E — George A.H. Fraser to Milton Smith, Jr., May 31, 1928.
- Exhibit F — Milton Smith, Jr., to George A.H. Fraser, June 1, 1928.
- Exhibit G — Marshall's Return of Service, *U.S. v. Brown*.
- Exhibit H — Milton Smith, Jr., to J.A. Kelly, Sept. 2, 1927.
- Exhibit I — George A.H. Fraser to the United States Attorney General, November 4, 1925.
- Exhibit J — Application of Right-of-Way across Santa Ana Pueblo Grant, December 30, 1929, by Mountain States Tel. & Tel. Co.

(Title Omitted in Printing)

AFFIDAVIT FOR AUTHENTICATING DOCUMENTS

My name is Omar Bradley. I am Agency Realty Officer for the Southern Pueblos Agency in the Bureau of Indian Affairs. My office has custody of the files of the Pueblo Lands Board and various other documents relating to the Pueblo Lands Act and the proceedings thereunder. I am familiar with those records and work with them in the ordinary course of business. Copies of documents from the Southern Pueblos Agency attached to Santa Ana Pueblo's brief as Exhibits B, C, D, E, F, G, and H are true and correct copies of the originals.

/s/ OMAR BRADLEY

STATE OF NEW MEXICO)
) SS
COUNTY OF BERNALILLO)

Subscribed and sworn to before me this 1st day of February, 1928, by Omar Bradley.

/s/ PEGGY L. BROWN WOLF
Notary Public

My Commission Expires:

EXHIBIT "B"

Santa Fe, New Mexico
c/o Pueblo Lands Board
March 10, 1928

Milton Smith, Jr.,
Assistant General Counsel,
Mountain States Tel. & Tel. Co.,
Telephone Building,
Denver, Colorado.

My dear Mr. Smith:

The Mountain States Company is one of the defendants in the suit of U. S. as Guardian of the Pueblo of Santa Ana vs. Brown et al. I am informed, however, that you have obtained a right of way deed from the Indians of this Pueblo and that it will be presently forwarded to Washington for approval. Please let me know if I am right in this, and if so, please inform me as soon as the transaction becomes complete.

I wish to take the bill pro confesso against various defendants who have not appeared, but will not do so as against your Company if satisfied that its title will presently be perfected. Please let me know what the situation is.

Very sincerely yours,

GAHF-S

Special Assistant
to the Attorney General.

EXHIBIT "C"

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

Telephone Building
Denver, Colorado

March 12, 1928.

MILTON SMITH
Vice President and General Counsel

Mr. George A. H. Fraser,
Special Assistant to the Attorney General,
c/o Pueblo Lands Board,
Santa Fe, New Mexico.

Dear Mr. Fraser:

With reference to your letter of March 10, concerning the suit of the United States as Guardian of the Pueblo of Santa Ana v. Brown, et al, I beg to advise that The Mountain States Telephone and Telegraph Company has obtained a right of way deed from the Indians of the Pueblo of Santa Ana, in the form of the other deeds which we have heretofore obtained from the various Pueblos. This deed is being forwarded to Washington for approval. I will be sure and let you know just as soon as such approval is received.

I thank you for your interest in the matter, and assure you that I very much appreciate it.

Yours truly,

/s/ MILTON SMITH
Assistant General Counsel

MSJr/BLM

EXHIBIT "D"

THE MOUNTAIN STATES TELEPHONES AND
TELEGRAPH COMPANY

Telephone Building
Denver, Colorado
May 23, 1928.

MILTON SMITH
Vice President and General Counsel

Mr. George A. H. Fraser,
Special Assistant to
the Attorney General,
c/o Pueblo Lands Board,
Santa Fe, New Mexico.

Dear Mr. Fraser:

This is to advise you that we have just received the agreements with the Pueblos of Santa Ana and San Felipe, approved by the Department of the Interior on April 13th, 1928. Two photostatic copies of each of these agreements are being forwarded to the Pueblo Lands Board this date.

I trust that with this information and with the filing of the agreement, the suit of the Pueblo de Santa Ana v. Brown may be dismissed as to The Mountain States Telephone and Telegraph Company. If you wish a stipulation signed by this Company, please advise me.

With kindest personal regards, I am,

Yours truly,

/s/ MILTON SMITH, JR.
Assistant General Counsel.

MSJr/HY

EXHIBIT "E"

Santa Fe, New Mexico
May 31, 1928

Milton Smith, Jr., Esq.,
Asst. Gen. Counsel,
Mt. States Tel. & Tel. Co.,
Denver, Colo.

Dear Mr. Smith:

Re: U.S. as Guardian of the
Pueblo of Santa Ana v. Brown,
et al.

Thank you for your letter of May 23rd informing me that your conveyance from the Pueblo of Santa Ana has

been approved by the Secretary of the Interior. I have pleasure in enclosing herewith copy of order of dismissal as against your company just entered by the federal court in this suit.

I also note that your San Felipe conveyance has been approved, and will, therefore, leave out your company from the suit which I am just bringing as to that pueblo.

With kindest regards, I am

Very sincerely yours,

Spec. Asst. to Attorney General.

EXHIBIT "F"

THE MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY

Telephone Building
Denver, Colorado

Milton Smith
Vice-President and General Counsel

June 1, 1928

Mr. George A. H. Fraser,
Special Assistant to the Attorney General,
Santa Fe, New Mexico.

Re: U. S. as Guardian of the
Pueblo of Santa Ana v.
Brown, et al.

Dear Mr. Fraser:

I acknowledge receipt of your letter of May 31 enclosing copy of order of dismissal against the telephone company in the above case, and wish to thank you for your trouble in this connection.

With kindest personal regards, I am

Yours very truly,

/s/ MILTON SMITH, JR.
Assistant General Counsel.

MS:Jr:H

EXHIBIT "G"

MARSHAL'S RETURN

UNITED STATES OF AMERICA)
DISTRICT OF NEW MEXICO) ss:

I, Joseph F. Tondre, United States Marshal for the District of New Mexico, hereby certify that the within writ came to hand on the 15th day of December A.D. 1927, and that same was duly executed by delivering to the within named defendants on the dates, at the places and in the manner mentioned in the list attached hereto, a true copy of the within writ, together with a copy of the complaint thereto attached at places indicated in list attached hereto in Sandoval County, State of New Mexico.

Form No. 282

RETURN ON SERVICE OF WRIT.

UNITED STATES OF AMERICA)
DISTRICT OF NEW MEXICO) ss:

I hereby certify and return that I served the annexed Subpoena in Chancery together with copy of the Complaint on the therein-named Rev. A. T. Daeger, Archbishop of Santa Fe, representing the Roman Catholic Church of New Mexico; The Western Union Telegraph Co., by serving

copy on J. B. Burns, Sty. Agent; The Mountain States Tel. & Tel. Co. by serving copy on G. J. Speechly, Sty. Agent and the Atchison Topeka and Santa Fe Railway Company, by serving copy on H. S. Lutz, Sty. Agent by handing to and leaving a true and correct copy thereof with them personally at Santa Fe in said District on the Fourteenth day of December, A.D. 1927.

JOSEPH F. TONDRE
U. S. Marshal

By (Signed—Illegible)
Deputy

29 Mrs. Juana Gallegos	J. N. Griego	do	do	2.00
28 Mrs. Genoveva Griego	Personally	do	do	2.00
29 Juan N. Griego	do	do	do	2.00
29 Remedios Baca	do	do	do	2.00
				<hr/>
				\$ 42.00

Equity

Case No. 1814

Copy to Mr. Frazer.

Date	Name	Served on	Place	County
Dec. 1927				
27	Chas. F. Brown	Personally	Bernalillo	Sandoval
27	Sostenes Jaramillo	do	Llinito	do
14	Rev. A. T. Daeger	do	Santa Fe	Santa Fe
29	Virginia Perea	C.F. Brown	Bernalillo	Sandoval
19	Carlota P. Otero	do	do	do
19	Barbara P. Yrisarri	do	do	do
14	The A. T. & S. F. Ry. Co.	H.S. Lutz, Agt.	Santa Fe	Santa Fe
14	Western Union Tel Co,	J.B. Burns, Agt.	do	do
27	Postal Tel-Cable Co,	J.S. Creegan, Agt,	Albuq.	Bernal.

14 Mt. Sts. T. & T. Co.	G.J. Speechly, Agt.	Santa Fe	Santa Fe
28 Maurico Montoya	Personally	Llanito	Sandoval
28 Francisquita Valdez	do	do	do
29 Julianita Valdez	do	do	do
29 Emilia Valdez	do	do	do
30 Manuel Gutierrez	do	do	do
30 Miguel Montoya	do	do	do
30 Onesimo Valdez	do	do	do
27 Porfilia Archibeque	do	do	do
27 Jesus Teofilo Valdez	P.Martinez	do	do
27 Francisco Griego	Personally	do	do
28 Diego Gutierrez	do	do	do
29 Mrs. Juana Gallegos	J.N. Griego	do	do
28 Mrs. Genoveva Griego	Personally	do	do
28 Juan N. Griego	do	do	do
30 Remedios Baca	do	do	do

EXHIBIT "H"

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

TELEPHONE BUILDING
DENVER, COLORADO

September 2, 1927.

MILTON SMITH

Assistant General Counsel

Mr. J. A. Kelly,
State Plant Superintendent,
The Mountain States Tel. & Tel. Co.,
El Paso, Texas.

Dear Sir:

In 1924 a right of way was obtained from the United States Government across the Laguna and Acoma Pueblos.

The application for the right of way was made under the Act of March 4, 1911.

As you probably know, it has been held that applicants for rights of way under that Act acquired no rights of way across the Indian Pueblos in New Mexico.

I am now preparing agreements to be executed by the officers of the two pueblos above mentioned, and also an application to the Secretary of the Interior for his approval of those agreements. I wish to attach to the agreements blueprints showing the exact location of the line.

From the map prepared in 1924 for the old application the description across these pueblos is so connected that I cannot definitely separate the description pertaining to the Laguna Pueblo and the one pertaining to the Acoma Pueblo; also, on that map it appears that the line crosses what is known as Executive Order Lands. Presumably these last mentioned lands are not within the boundaries of the two pueblos.

Mr. J. A. Kelley—2

Will you please advise me whether the Executive Order Lands are included within the boundaries of the pueblos, and also whether they are a part of the lands owned by the pueblos.

Will you also please prepare and send me a description showing the route of our line across the Pueblo de Acoma and another description showing the route of our line across the Pueblo de Laguna.

Yours truly,
/s/ Milton Smith, Jr.
Assistant General Counsel.

MS.JR:H

EXHIBIT "I"

DEPARTMENT OF JUSTICE
WASHINGTON, D.C.

ADDRESS REPLY TO
"THE ATTORNEY GENERAL"
AND REFER TO
INITIALS AND NUMBER

BIF

No. 210663

Santa Fe, N. M. Nov. 4, 1925.

PUEBLO LANDS BOARD.

The Attorney General,

Washington, D.C.

Sir:

As a matter of information and record, I wish to follow up my last letter (undated, but written about October 30th) on the question of suits to quiet title and other matters arising under the Pueblo Lands Act of June 7, 1924. Also, you may wish to approve or disapprove my tentative views on the proper course to pursue.

1. As stated in that letter, I fear that, even if the objection of multifariousness is overruled, the suit to quiet title may be dismissed against any defendants who prove that they are in possession and raise the objection that a suit in equity deprives them of their constitutional right to a jury trial. If so, there will be tracts the Indian titles to which have been held by the Board to be unextinguished and of which defendants yet retain possession. If such cases occur, I judge that it will be the duty of the United

States under its general power of guardianship, apart from the Act, to bring separate suits in ejectment against such defendants.

Since the Act is mandatory in the matter of a suit to quiet title, I assume that that course must be tried first, whatever we may think as to its soundness.

In the case of Tesuque, it is possible that no defendants will raise the constitutional question, in spite of their announced intention to do so; but in the long run, it is hardly conceivable that this point will not be raised somewhere at some time.

2. I find that under local State practice, in suits to quiet title, it is universal to add to the defendants named "all unknown persons claiming any interest or title adverse to the plaintiff." This is authorized by early acts and by an amendatory act of 1925. Service is then had by publication. I am unable to find any Federal statute or

(2)

rule authorizing the inclusion of unknown persons as defendants, although there is a familiar statute providing for service by publication on defendants not found. While of course a State act cannot enlarge Federal equity jurisdiction, yet various Supreme Court cases say that the Federal Court may, if it please, enforce a right created by State law. Service by publication in English and Spanish for the statutory six weeks would probably cost about \$100.00. It is possible that there are persons not in possession and who have placed no deeds on record who yet have deeds from a Pueblo or some Mexican living thereon which might later form the basis of a claim. A very large number of the earlier deeds presented to the Board as color of title have never been recorded.

The question then is whether it is worth while to make "unknown persons" defendants and to incur the expense of service by publication, in view of the uncertainty whether this will do any good. Considering that this is the regular practice in New Mexico and that it apparently

effects a completeness otherwise wanting, I am inclined to follow it. Please give me your instructions as to this.

3. This same difficulty becomes acute in the case of the Pueblo at Jemez, where only three non-Indian claims were presented. I do not know how the Board will decide them, but having listened to the evidence would expect it to uphold them. If so, there would be no known claimants at all to the Indian lands title to which the Board finds unextinguished, and if the suit to quiet title is brought, the only possible defendants would be "unknown defendants." Yet, under the provisions of the Act, the suit is mandatory.

If this turns out to be the situation, I would be inclined to bring the suits against "unknown defendants" for what it may be worth.

4. But Jemez will probably produce still another complication. On July 11, 1924, the Secretary of the Interior approved an application of the Santa Fe & Northwestern Railway Company for a right-of-way across the Jemez Pueblo lands, a distance of about 14 miles (incidentally, a similar right-of-way was approved across two other Pueblo grants,—Zia and Santa Ana). This was in pursuance of surveys and negotiations beginning about July, 1921. The Indians were very loath to permit the railway to cross their grant, but were finally persuaded or gently forced to

(3)

do so. No court proceedings were had. An informal appraisal of damages was made by H. F. Robinson, Supervising Engineer, Indian Irrigation Service, Albuquerque, F. C. H. Livingston, then Special Attorney for the Pueblo Indians, Belen, and Louis R. McDonald, Agency Farmer, Jemez Pueblo, aggregating \$2,946.55. This amount was apportioned and distributed among the individual Indians whose lands were taken, or damaged, although part went to the Pueblo as an entity. The money was accepted, although apparently with some demur. Mr. Robinson, who is an experienced and conscientious man, assures me that the damages awarded were adequate. The whole matter was engineered by H. P. Marble, Superintendent of the

Southern Pueblos, Albuquerque, who recommended approval to the Commissioner of Indian Affairs, who, in turn, recommended it to the Secretary. The railway was originally a private carrier—a logging railway—but has recently been recognized as a common carrier by the Interstate Commerce Commission. It was constructed across the Pueblo during 1923 and 1924; probably had trains running in 1924, and is still in operation.

The Act by which it is attempted to justify all this is that of March 2, 1899, 30 Stat. L. 990, as amended June 25, 1910, 36 Stat. 859, Compiled Statutes, Sec. 4181. This authorizes, under certain conditions,

“A right-of-way for a railway, telegraph, and telephone line through any Indian Reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian Agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation.”

The only possible portion of the above which could authorize the allowance of this right-of-way is the expression “through any lands held by an Indian tribe or nation in Indian Territory.” But Sections 22 and 23 of an Act of Feb. 28, 1902, 32 Stat. 50, repealing the above Act insofar as it applies to Indian Territory and Oklahoma, make clear to my mind that the expression “Indian Territory” means the territory now embraced in the state of Okla-

(4)

homa and not Indian territory in general. The statute relied on, therefore, seems to me to furnish no justification for the grant or approval of this right-of-way over lands owned in fee by the Pueblo. This view is emphasized by Section 17 of the Pueblo Lands Act of June 7, 1924, reading in part:

“No right, title or interest, in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined, shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress.”

This was passed prior to the Secretary's approval. If the foregoing is correct, the railway is a trespasser, and indeed could only have acquired a right-of-way by special act of Congress in view of Section 2, paragraph 2, of the New Mexico Enabling Act, whereby the Pueblo lands are declared to be “subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.”

The Railway Company did not present its claim to the Board, which informally advises me that it intends to return the land over which the railway passes, as Indian land the title to which has not been extinguished.

The question will then be squarely presented as to what course we must take. Section 3 of the Pueblo Lands Act requires a suit to quiet title to all Indian lands so returned, but, as above stated, the only known defendant so far will probably be this Railway Company, which is unmistakably in possession, so that a suit to quiet title will not lie. By the weight of authority, ejectment will lie against a railway which has come on a man's land as a trespasser; but as a practical matter it is impossible to get rid of a Railway once in operation, and a court would go far to defeat such action in a case like this, where development of the State is promoted and influential local interests are involved.

(5)

An action in trespass for damages will also lie, and in this case the amounts actually paid the Indians could be counterclaimed. If they were adequate, plaintiff would have no recovery.

Although satisfied that the Appraisers acted in good faith and believed the award to be adequate, I doubt if it is really so for this reason: In the way these people live, two or three acres will support a family all their lives. An award of \$300 or \$450, producing a theoretical income of \$18.00 or \$27.00 a year, is obviously a totally inadequate equivalent.

After much reflection, I recommend two proceedings in Jemez, in case the situation develops as hereinabove indicated.

- (a) A suit to quiet title against all unknown defendants.
- (b) An action in trespass against the Railway Company, in which we may hope to recover some additional damages.

While one is reluctant to criticize the course of the Department of the Interior, it seems to me that if the land over which the Railway runs is returned by the Board as Indian land with unextinguished title, the Lands Board Act leaves no alternative but to sue. This is especially appropriate where the Department has acted without any opinion from the Attorney General and apparently without authority of law.

5. There will be still another difficulty at Jemez. On September 28, 1878, an agreement was made between the Governor and Principales of Jemez and B. M. Thomas, then Indian Agent, reading as follows:

"It is hereby agreed by and between the Pueblo of Jemez, represented by the Governor and officers and principals thereof, on the one part; and B. M. Thomas, U.S. Indian Agent on the other part, that a certain piece of land situated at the northeast side of the Pueblo of Jemez, extending from the house now being built thereupon, for Mission and School purposes, distances and directions herein described, viz: To the north seventy-five yards; to the east thirty-five yards; to the south seven yards; to the west ten yards; be and hereby is devoted to school purposes

for the benefit of said Pueblo, so long as the parties

(6)

building the house shall maintain a school upon said premises for the benefit of said Pueblo.

"In testimony whereof we, the parties of both parts, hereby sign our names at the Pueblo of Jemez this twenty-eighth day of September, one thousand eight hundred and seventy-eight."

(Signed by the Governor and 12 other officials and Ben M. Thomas, U.S. Indian Agent.)

Although no mention is made of the real party in interest, this agreement was for the use of the Presbyterian Mission, which proceeded to construct a building on the premises described. I am told that it might cost \$1500 to \$2000 at present prices to reproduce it.

This agreement is not a lease and may probably be classified as a license to occupy the land. The Mission presented no claim to the Board, which therefore took no official cognizance of the situation and will probably return the land in question as Indian land the title to which is not extinguished. Since the Act requires suit to quiet title to such land, at first glance it would appear that the Mission should be made a defendant; but it is obviously in possession and therefore a suit to quiet title is not appropriate, at least if objection on that ground is made. Further, insofar as the above agreement has any legal effect, it shows that the Mission's possession is not adverse, for which reason also a suit to quiet title is inappropriate.

Probably the Mission is technically maintaining a school, as the agreement provides, since it has the building with a person ready and willing to teach. In fact, however there is not a single pupil in attendance, nor has there been for a long time back, and the Indians, or some of them, would like to have the land, and more especially the building.

After attempting to balance the facts, my opinion is that the Mission should not be made a party to the suit to quiet title, nor otherwise sued, because its possession is not adverse. If the Indians are dissatisfied with the situation, they should first give notice to the Mission of the termination of the license, and then proceed, independently, or ask their official attorney, to proceed to recover possession in any appropriate way. If you disagree with the foregoing, please inform me.

(7)

6. You are aware from this and previous letters that the Lands Board Act is a well meaning but ill constructed measure which develops difficulties at every step. Mr. Jennings intends to submit to you before long an amendment to Section 2, designed to clarify the financial situation, and naturally the desirability of amending the Act in various other particulars has been under discussion. There seems to be much hesitation, however, in suggesting any change to Congress because the difficulty of procuring the passage of the Act in its present shape was so great that there is fear lest it be emasculated if the attention of Congress is again directed to it.

So far as the suit to quiet title goes, it is doubtless desirable to try out the working of this requirement before suggesting any change. There is, however, one matter which seems to me of immediate importance. The valuation report required by Section 6 is given the effect of a judicial finding and final judgment. The primary report required by Section 2, which separates the Indian from the non-Indian lands, is not expressly given any weight whatever, although it is the most important of the four reports provided for. So far as the Act shows, its only effect is to describe the Indian land which is to be the subject of the suit to quiet title and in a way to designate the defendants in such suit, or some of them. I think at least that this report should be prima facie evidence in the suit of the matters and things therein decided, and I also think that it should be permissible to introduce in the suit the evidence taken before the Board, or any part of it, subject, of course, to be rebutted or supplemented by

other evidence. If you agree with me in this, I will be glad to submit a draft of a proposed amendment to Section 3 along these lines.

Respectfully,

/s/ George A. H. Fraser,
Special Assistant to the Attorney General.

GAHF-S

EXHIBIT "J"

HONORABLE SECRETARY OF THE INTERIOR,
Washington, D.C.

APPLICATION FOR RIGHT OF WAY
FOR THE TELEPHONE AND TELEGRAPH
LINE THROUGH THE SANTA ANA
PUEBLO GRANT, NEW MEXICO.

Dear Sir:

The Mountain States Telephone and Telegraph Company, corporation duly organized under and existing by virtue of the laws of the State of Colorado and authorized to do business in the State of New Mexico, hereby applies for a grant of right of way to The Mountain States Telephone and Telegraph Company, its successors and assigns, for a telephone and telegraph line over, through and under lands in the Santa Ana Pueblo Grant, State of New Mexico, as follows:

Beginning on the South boundary of the Santa Ana Pueblo Grant at a point bearing North 89° 49' East, 215.2 feet from mile post 1½, set by the General Land Office Resurvey of 1915, in Section 5, Township 13 North, Range 3 East New Mexico Principal Meridian; thence in a general Northwesterly direction across the Santa Ana Pueblo Grant to the West boundary of said

Grant, from which point the $3\frac{1}{2}$ mile post bears South $0^{\circ} 7'$ East 293.4 feet; being a total distance of 4.43 miles;

said right of way being more particularly described in the map and field notes hereto attached.

This application is made pursuant to the provisions of Section 3 of the Act of March 3, 1901, (31 Statutes at large, 1058-1083) and the Act of April 21, 1928, (Chapter 400, 45 Statutes at Large, Page 442) and in pursuance of the regulations of the Department.

The following documents are hereto attached and made a part of this application:

Exhibit A—Map showing the line of route of the said right of way, inscribed upon which is an affidavit of Mr. F. A. Cannon, Superintendent of Rights of Way, to the effect that the survey of said right of way was made under his direction and is accurately represented on said map, and there is also inscribed upon said map a statement by the Company's General Plant Manager and attested by the Secretary under the Company's seal, showing the authority of the said Superintendent of Rights of Way to make the survey, and certifying also to the accuracy of said map and the purposes thereof.

Exhibit B—Copy of the field notes and survey upon which said map is based.

Exhibit C—Affidavit of the applicant's General Plant Manager under the seal of the Company,

showing the names and designations of its officers at this date.

Exhibit D—Certified copy of a resolution of the Board of Directors authorizing the General Plant Manager of said Company to execute on behalf of the said Company applications for rights of way.

Exhibit E—Certificate of the General Plant Manager of the applicant Company to the effect that the organization of said Company has been completed and that the said Company is fully authorized to proceed with the construction and maintenance of the said telephone and telegraph line above referred to and that a copy of the articles of incorporation of said Company has heretofore been filed with the Department of the Interior and that no changes have been made therein since the said filing.

The Mountain States Telephone and Telegraph Company further states that copies of its articles of incorporation have heretofore been forwarded to the Department of the Interior and that a certificate of the Corporation Commission of the State of New Mexico, showing that the applicant Company has complied with all of the laws of that state relating to or governing foreign corporations, has heretofore been filed in connection with an application for right of way across the Las Cruces Land District, in the State of New Mexico, which application was dated May 29, 1929, and that the certificate of the Secretary of State of the State of Colorado to the effect that the articles of incorporation of The Mountain States Telephone and Telegraph Company were filed in his office according to law

on the 17th day of July, 1911, has already been transmitted to the Secretary of the Interior in connection with applications for rights of way across the Phoenix Land District and in connection with applications for rights of way over other public lands in its jurisdiction, and that the certificate of the Secretary of State of the State of Colorado to the effect that no change has been made in the corporation laws of the State of Colorado since the session of the Twenty-seventh General Assembly of the State of Colorado which convened in the City and County of Denver on the second day of January, A.D. 1929, and that certified copies of all of the acts passed by said session have been heretofore forwarded by the Secretary of State of the State of Colorado to the General Land Office of the United States at Washington, D.C., the same completing the statutes of the State of Colorado in relation to corporations now in force in this state, have heretofore been submitted to the Secretary of the Interior in connection with applications for rights of way across other lands within his jurisdiction and are now on file in his department, reference being particularly made to an application for right of way for telephone and telegraph line through the Evans-ton Land District, State of Wyoming.

The Mountain States Telephone and Telegraph Company further states that it intends in good faith to construct, maintain and operate a telephone and telegraph line along the right of way hereby applied for and respectfully requests that said right of way be granted in accordance with this application.

Dated at Denver, Colorado, this 30th day of December, A.D. 1929.

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

By N. O. Pierce
Its General Plant Manager

Attest:

A. R. Grosheider
Secretary.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-841-M Civil

PUEBLO OF SANTA ANA,
Plaintiff,

vs.

MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION
AND
ORDER

(Filed June 2, 1982)

This matter arises on cross motions for summary judgment by defendant, Mountain States Telephone and Telegraph Co., (Telephone) and plaintiff Pueblo of Santa Ana (Pueblo). The parties agree and I find that there are no material issues of fact as to the issues presented. The plaintiff is entitled to judgment as a matter of law as to those issues.

The Pueblo seeks damages from the defendant for a trespass which began in 1907 and has continued to the present. The trespass is a telephone and telegraph line constructed by defendant's predecessor across lands held

by the Pueblo in fee simple but subject to federal restraints against alienation. Telephone argues it obtained a valid right of way across the Pueblo's land in 1928 pursuant to § 17 of the Pueblo Lands Act of June 7, 1924. 43 Stat. 636. Telephone also argues plaintiff's claims are barred by the judgment in *United States as Guardian of the Pueblo of Santa Ana v. Brown*, No. 1814 Equity (D. N.M. 1928). The issues presented are: (1) Did Congress, in § 17 of the Pueblo Lands Act, intend to grant to the Pueblos of New Mexico authority to alienate their land? (2) Are Santa Ana's claims barred by the judgment in *U. S. v. Brown*?

THE PUEBLO LANDS ACT

Section 17 of the Pueblo Lands Act provides:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as herein before determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity and unless they be first approved by the Secretary of Interior.

It is not disputed that the Secretary, on April 12, 1928, approved the right of way granted to Telephone by the Pueblo. Pueblo argues, however, that Telephone could not obtain a valid right of way pursuant to § 17 because § 17 was an extension of the Indian Non-Intercourse Act to the Pueblos of New Mexico, and not a grant of authority to the Pueblos and the Secretary to alienate Pueblo lands. Pueblo maintains § 17's prohibition against the

alienation of Pueblo lands except as Congress may provide in the future and its requirement of Secretarial approval closely parallels and was intended to extend to the Pueblos the Non-Intercourse Act's requirement of a treaty or convention negotiated by an officer of the United States to alienate Indian lands. Acts of June 30, 1834, 4 Stat. 730 § 12, (codified at 25 U.S.C. 177), and February 27, 1851, 9 Stat. 587. Telephone argues the first clause of § 17 refers to condemnation or other similar takings which Congress may authorize in the future and the second clause was intended by Congress to allow grants of Pueblo lands by the Pueblos so long as the approval of the Secretary was first obtained. A brief discussion of the circumstances surrounding the enactment of the Pueblo Lands Act is necessary to an understanding of the issue.

The Pueblo Lands Act was a congressional response to the confusion created by the Supreme Court's conflicting decisions in *U.S. v. Joseph*, 94 U.S. 614 (1876); *U.S. v. Sandoval*, 231 U.S. 28 (1913); and *U.S. v. Candelaria*, 271 U.S. 432 (1925). In *Joseph*, the issue was whether the Pueblos of the Rio Grande Valley of New Mexico were afforded protections under the Indian Non-Intercourse Acts. Acts of June 30, 1834, 4 Stat. 730, § 12 and February 27, 1851, 9 Stat. 587. The Act of June 30, 1834, among other things, forbade the transfer of Indian lands unless the grant "be made by treaty or convention entered into pursuant to the Constitution." Section 12 also requires that the treaty or convention be negotiated by an officer of the United States. The Act of February 27, 1851 extended the protections of the June 30, 1834 Act to the Indian Tribes of the newly acquired Territory of New Mexico. However, the Court in *Joseph* held the Acts did not apply

to the Pueblos of New Mexico because, unlike other Indian Tribes, Pueblo lands was owned in fee simple and also because the Pueblo Indians were sophisticated such that federal protections were not required. After the decision in *Joseph*, the United States made no effort to prevent encroachment on Pueblo lands.

However, the Court again had the opportunity to consider the status of the Pueblos in *Sandoval* and *Candelaria*. In *Sandoval* the Court held that the Pueblo Indians were ethnically and historically "Indians" and that Congress had the power to define them as such in the New Mexico Statehood Enabling Act of June 20, 1910. 36 Stat. 557. In *Candelaria*, a quiet title action, the Court was again presented with the question of the applicability of the Indian Non-Intercourse Acts to the Pueblos. Acts of June 30, 1834 and February 27, 1851. In holding that the Pueblos were afforded the protections of the Non-Intercourse Acts, the Court stated,

"While there is no express reference in the provision (the provision prohibiting settlement on Indian Lands in the Act of 1834) to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians.' Although, sedentary, industrious and disposed to peace, they are Indians in race, custom and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill-prepared to cope with the intelligence and greed of others." 271 U.S. at 442.

The decision in *Candelaria* created uncertainty in New Mexico for those who had settled on Pueblo lands between the time of the decisions in *Joseph* and *Candelaria*. In *Candelaria*, the Court held that the Pueblos were protected by the Non-Intercourse Acts and had been since the Acts were extended to the Pueblos of New Mexico in

1851. Therefore, those who had settled on Pueblo lands in good faith since 1851, were in violation of the Non-Intercourse Acts. The Pueblo Lands Act was Congress' response to this dilemma.

The Act created the Pueblo Lands Board and charged it with the responsibility of investigating title to Pueblo lands and filing actions in Federal District Court to recover certain lands of the Pueblos. Section 3. Other Pueblo lands, where the settlers could establish title under state or territorial law or where they could comply with the statute of limitations contained in Section 4 of the Pueblo Lands Act, were to be awarded to the settlers. Section 5. The Pueblos were to be compensated for property lost to the non-Indian settlers. Section 6.

In the Pueblo Lands Act, Congress was attempting to work an equitable solution to the thorny problem created by uncertainty as to the status of the Pueblo Indians. I am convinced that Congress was also, in § 17, reaffirming through congressional enactment what the Supreme Court decided in *Candelaria*: The Pueblos are Indians and wards of the federal government and Congress intended they be afforded the protections of the Indian Non-Intercourse Acts.

The Tenth Circuit reached a similar conclusion in *Plains Elec. Gen. and Tr. Co-Op v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir. 1976). In *Plains*, the issue was whether Congress had repealed, by implication, a general Pueblo land condemnation statute by its subsequent enactment of a specific, comprehensive scheme for the acquisition of rights of way across Pueblo lands. In holding there had been a repeal, the Court stated,

The history of these statutes (26 U.S.C. §§ 311-328; statutes providing for the acquisition of rights of way across Pueblo lands) reflects an effort to overcome the problems caused by the unique nature of Pueblo Indian land holdings and to provide them with the same protections given the lands of other Indians. The United States Supreme Court has held that Pueblo lands are subject to such protection, *United States v. Candelaria*, [271 U.S. 432 (1925)] and *United States v. Sandoval*, [231 U.S. 28 (1913)], and the intent of Congress to provide such protection cannot be doubted.

Accordingly, I will determine whether Congress intended § 17 to grant to the Pueblos authority to alienate their lands with Secretarial approval, by determining whether such a grant of authority is consistent with the Indian Non-Intercourse Acts, and federal Indian policy generally.

The Constitution rests the power to deal with Indian tribes in the Congress. Included in that power is the exclusive right to extinguish Indian titles. Act of June 30, 1834, 4 Stat. 730; *U. S. v. Santa Fe Pacific Rlwy Co.*, 314 U.S. 339, 347 (1941). Congress' intent to authorize alienation of Indian lands must be clear and express. *Chippewa v. U.S.*, 307 U.S. 1 (1939). Doubtful expressions of congressional intent to authorize alienation of Indian land must be resolved in favor "[of the Indian . . . who is] wholly dependent on its [the federal government's] protection and good faith." *U.S. v. Santa Fe Pacific Rlwy Co.*, at 354. Although Congress may delegate its power, the unilateral action of an officer of the Executive Branch cannot alienate land. Whether Congress intended to delegate its authority to alienate Indian lands must be determined against the "strong background of maintenance of congressional control." *Turtle Mountain Band of Chippewa Indians v. U.S.*, 490 F.2d 935, 946 (Ct. Claims 1974).

By the terms of § 17 of the Pueblo Lands Act, there is no authorization for the grant or sale of Pueblo lands. Although such authorization might be inferred from the Section's requirement of Secretarial approval, I decline to do so. The claimed authorization is not clear and express. Furthermore, it would be anomalous to conclude that Congress, having expressed its intention to afford the Pueblos the protection of other Indians, abandoned its objective and completely delegated its authority to the Secretary, with no restrictions, unlike other Indian Tribes. Such irrationality and arbitrariness should not be attributed to the Congress that was attempting to solve the problems created by the Supreme Court's erroneous decision in *Joseph*. See *Morton v. Mancari*, 417 U.S. 535, 548 (1974).

The construction of § 17 offered by the Pueblo is certainly more reasonable. The Secretary has adopted the construction offered by the Pueblo. 25 C.F.R. 121.22 provides:

Tribal Lands. Lands held in trust by the United States for an Indian Tribe. Lands owned by a tribe with federal restrictions against alienation and any other land owned by an Indian Tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the act of Congress authorizing sale provides that approval is unnecessary. (See 25 U.S.C. 177 [Act of June 30, 1834]).

Although the Secretary has not always construed the Act of June 30, 1834 and § 17 of the Pueblo Lands Act to require congressional authorization (apart from § 17) and the approval of the Secretary, as evidenced by the

Secretary's approval of the right of way at issue in this case, the Secretary's differing constructions of § 17 illustrates my conclusion that § 17 was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands.

RES JUDICATA
AND
COLLATERAL ESTOPPEL

Telephone also argues Pueblo's claim from 1928 to the present is barred by the judgment in *U.S. v. Brown*, No. 1814 Equity (D.N.M. 1928). *Brown* was brought by the United States as guardian of the Pueblo pursuant to § 4 of the Pueblo Lands Act to quiet title to Santa Ana Pueblo lands. In the course of the suit, before Telephone filed its answer, the United States moved to dismiss Telephone on the ground that Telephone had obtained a valid right of way, the right of way at issue here. Dismissal was ordered the day the motion was filed and the order of dismissal did not state whether the dismissal was with or without prejudice. The dismissal is, therefore, without prejudice. Fed.R.Civ.P. 41; *Homeowners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir. 1943).

Telephone argues that Pueblo's claims from 1928 are *res judicata* and that the Pueblo is collaterally estopped from relitigating the validity of the right of way at issue in this case. A final judgment on the merits is essential in order for an action to be *res judicata*. For collateral estoppel to apply, the factual issue must have been actually litigated and necessarily decided. Wright, Miller and Cooper, *Federal Practice and Procedure Jurisdiction* § 4406 at p. 45; *Craft v. Choate*, No. 81-1893 (10th Cir. Slip Opinion, April 5, 1982). There was no judgment on

the merits in *Brown* and the validity of Telephone's right of way was not actually litigated or necessarily decided.

Telephone concedes that it was dismissed from the suit on the pretrial motion of the United States, but it maintains that the dismissal should be afforded the status of a judgment on the merits because of the Court's observation in the order of dismissal that "it appear[ed] to the court that since the institution of this suit, said defendant has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928 by the Secretary of Interior in accordance with the provisions of § 17 of the Pueblo Lands Act of June 7, 1924."

I am not convinced that the court's observation as to the reasons the United States moved for dismissal should elevate the order of dismissal to the status of an order on the merits. Substance must govern over form. The order of dismissal in *Brown* was not an order on the merits and the issue of the validity of Telephone's right of way was not actually litigated and necessarily decided. It is not uncommon for a court to state in its order of dismissal the reason plaintiff moved for the dismissal. Plaintiff's claims are not *res judicata* and the factual issues present in those claims are not precluded by collateral estoppel.

In conclusion, § 7 of the Pueblo Lands Act was intended by Congress to reaffirm the protections afforded the Pueblos under the Acts of June 30, 1834 and February 27, 1851. It was not intended to grant to the Pueblos and the Secretary *carte blanc* to alienate Pueblo lands for any reason. Plaintiffs claims are not barred by the judg-

ment in *U.S. v. Brown*. The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied.

/s/ E. L. Mechem
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Title omitted in printing)

ORDER
(Filed July 13, 1982)

This matter arises for consideration on defendant's motion to certify an interlocutory appeal of my order of June 2, 1982, pursuant to 28 U.S.C. 1292(b) (1976). Having considered the motion and being otherwise advised in the premises, I find that the issue determined in that order involves a controlling question of law as to which there is substantial ground for difference of opinion. I further find that an immediate appeal may materially advance the ultimate termination of the litigation. Now, Therefore,

IT IS ORDERED that defendant is hereby granted an interlocutory appeal from my order of June 2, 1982 pursuant to 28 U.S.C. 1292(b) (1976).

/s/ E. L. Mechem
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NOVEMBER TERM —January 28, 1983
Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein and Honorable James K. Logan, Circuit Judges

Misc. No. 82-8041

MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

Petitioners,

vs.

PUEBLO OF SANTA ANA,

Respondent.

This matter comes on for consideration of the petition of Mountain States Telephone and Telegraph Company for permission to appeal an order of the United States District Court for the District of New Mexico, which was filed on June 2, 1982, and entered on June 3, 1982, and which order was amended by further order of the District Court filed July 13, 1982, and entered on July 14, 1982, in Civil Action No. 80-841-M.

Upon consideration whereof, it is ordered that the petition for permission to appeal is granted.

HOWARD K. PHILLIPS, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION
PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 83-1220

PUEBLO OF SANTA ANA,

Plaintiff-Appellee,

vs.

THE MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY

Defendant-Appellant.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY,

Amicus Curiae

PUEBLO DE ACOMA,

Amicus Curiae

PUBLIC SERVICE COMPANY OF NEW MEXICO,
Amicus Curiae

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(D.C. No. 80-841-M Civ.)

(Filed May 14, 1984)

Scott E. Borg of Luebben & Hughes, Albuquerque, New Mexico, for Plaintiff-Appellee.

Kathryn Marie Krause, Denver, Colorado (Stuart S. Gunckel, Denver, Colorado, with her on the brief) for Defendant-Appellant.

Gary Crosby, Santa Fe Industries, Inc., Chicago, Illinois and John R. Cooney, Lynn H. Slade, John S. Thal and Walter E. Stern, III of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, filed briefs on behalf of Amicus Curiae The Atchison, Topeka & Santa Fe Railway Company. Public Service Company of New Mexico joined in the Amicus Briefs of The Atchison, Topeka & Santa Fe Railway Company.

Arturo G. Ortego of Ortega & Snead, P.A., Albuquerque, New Mexico and Peter C. Chestnut of Albuquerque, New Mexico, filed a brief on behalf of Amicus Curiae of Pueblo de Acoma.

Before McWILLIAMS BREITENSTEIN and LOGAN,
Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is an interlocutory appeal from the United States District Court for the District of New Mexico which we permitted to be filed. The court granted partial summary judgment to the plaintiff-appellee, Pueblo of Santa Ana, and against the defendant-appellant, Mountain States Telephone and Telegraph Company, Mountain Bell. The dispute involves a right of way for a telephone and telegraph line across Pueblo lands. The trial court held in favor of the Pueblo and Mountain Bell appeals. We affirm.

The Pueblo was the owner of a tract of land situated in New Mexico which was a part of the El Ranchito Grant. In November, 1927, the United States pursuant to the

Pueblo Lands Act, 43 Stat. 636, filed an action in the federal district court for the district of New Mexico entitled *United States as Guardian of the Pueblo of Santa Ana v. Brown*, No. 1814 Equity (D.N.M. 1928), seeking to quiet title to this tract in the Pueblo. Mountain Bell was party to that suit. During the course of that litigation, the Pueblo entered into a right-of-way agreement with Mountain Bell, dated February 23, 1928, granting an easement to construct, maintain, and operate a telephone and telegraph line, the same line that is in controversy here. Acting pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, 641-642, the Secretary of the Interior approved the agreement. The United States then moved to have Mountain Bell dismissed from the action on the ground that it had obtained title to the right of way through the easement agreement. In granting this motion, the court noted that it appeared "that since the institution of this suit said defendant has secured good and sufficient title to the right of way and premises in controversy. . . ."

In the present action Mountain Bell argues that it obtained a valid right of way across the Pueblo's land in 1928 and under § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636. It argues further that the Pueblo's claims are barred by the 1928 dismissal of the case involving the same parties and issues. On these grounds, Mountain Bell moved for summary judgment that no trespass existed from 1928 to the present. The district court held, however, that § 17 did not authorize conveyance of lands by the Pueblo with the approval of the Secretary. The district court accepted the Pueblo's argument that § 17 was intended as a prohibition against the alienation of Pueblo lands except as Congress may provide in the fu-

ture. Its requirements of Congressional authorization and Secretarial approval paralleled and were intended to extend to the Pueblo the Nonintercourse Act's requirement of a treaty or convention entered into pursuant to the Constitution. See Acts of June 30, 1834, 4 Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177), and February 27, 1851, 9 Stat. 574, 587 § 7. The court further held that the Pueblo's claims were not barred by the 1928 dismissal order because that order did not constitute a final judgment.

Section 17 of the Pueblo Lands Act provides:

"No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, *or in any other manner except as may hereafter be provided by Congress*, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity *unless the same be first approved by the Secretary of the Interior.*" [Emphasis supplied.]

Mountain Bell challenges the argument of the Pueblo, upheld by the trial court, that § 17 was intended as an extension to the Pueblos of the Nonintercourse Act, in prohibiting alienation of Pueblo lands except as Congress may provide in the future and as approved by the Secretary. Mountain Bell argues that the first clause of § 17 requires Congressional approval for condemnations and other similar takings of Pueblo lands and that the second clause authorizes a Pueblo to alienate its lands if it obtains Secretarial approval. Analysis of these arguments requires an examination of the language, the historical back-

ground, the legislative history, and the administrative history of the Act.

The Nonintercourse Act required a treaty or convention to alienate Indian lands, Act of June 30, 1834, 4 Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177). The Act of February 27, 1851, 9 Stat. 574, 587 § 7, extended all laws then in force regulating trade and intercourse with the Indian tribes to include Indian tribes in the Territory of New Mexico.

In *State of New Mexico v. Aamodt*, 10 Cir., 537 F.2d 1102, cert. denied 429 U.S. 1121, a water rights case, we reviewed the historical background of the controversy, pp. 1105 and 1109, and pointed out, p. 1105, that the efforts of federal officials to protect the Pueblos' property were frustrated by the New Mexico territorial courts which held that the Pueblos were outside the protection of federal laws. This rationale was upheld by the Supreme Court in *United States v. Joseph*, 94 U.S. 614.

We noted, at p. 1105, that the 1910 New Mexico Enabling Act, 36 Stat. 557, 558-559, defined "Indian country" to include "all lands now owned or occupied by the Pueblo Indians" and stated that such lands are "under the absolute jurisdiction and control of the Congress of the United States." The constitutionality of this provision was upheld in *United States v. Sandoval*, 231 U.S. 28, which specifically overruled *United States v. Joseph*. The Court said, *Id.* at 39, that,

"The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government."

The Court noted that the United States has treated the pueblos "as requiring special consideration and protection, like other Indian communities." *Id.*

Because in the *Joseph* decision the Supreme Court decided that the Pueblo lands were not subject to the protective laws earlier passed by Congress, non-Indians were free to acquire Pueblo lands. The validity of titles so acquired became questionable when in *Sandoval* the Court held that the protective federal statutes did apply and presumably always had applied. Congress responded with the passage in 1924 of the Pueblo Lands Act, 43 Stat. 636. The Act established a "Pueblo Lands Board" to investigate the Pueblo lands and determine those cases in which the Indian title should be extinguished. The United States as guardian of the Pueblos was required to institute quiet title actions to settle adverse claims to Pueblo lands. Non-Indians claiming title could plead adverse possession and the statute of limitations, defenses not ordinarily available against the United States.

In 1926, the Court in *United States v. Candelaria*, 271 U.S. 432, reaffirmed *Sandoval*. In so doing, it said after referring to the 1834 and 1851 acts, p. 441:

"While there is no express reference in the provision to the Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words, 'any tribe of Indians.'"

We echoed this language, noting the application of the Nonintercourse Act to the Pueblo Indians in *Aamodt*, *supra.* In *Plains Elec. Gen. & Tr. Co-op v. Pueblo of Laguna*, 10 Cir., 542 F.2d 1375, 1376, we cited *Candelaria* as authority for the statement that "Lands of the Pueblos

cannot be alienated without the consent of the United States." In *United States v. University of New Mexico*, No. 83-1238, 10 Cir. opinion filed April 9, 1984, we noted that Congress extended the Nonintercourse Act to the Pueblos in 1851 and said that § 17 of the Pueblo Lands Act of 1924 "reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act." Slip Op. at 7. In so doing we noted the following statement in *United States v. Chavez*, 290 U.S. 357, 362:

"[T]he status of the Indians of the several Pueblos in New Mexico is that of dependent Indian tribes under the guardianship of the United States and that by reason of this status they and their lands are subject to the legislation of Congress enacted for the protection of tribal Indians and their property."

Thus we have three times held that the Pueblo's lands were under the protection of the Nonintercourse Act.

Mountain Bell argues that § 17 was not a grant of power to the Pueblos to convey their lands, but instead reaffirmed the power of alienation which already existed in the Pueblos, and implemented the government's guardianship role by restricting that power. This view is insupportable. The House Report on the Pueblo Lands Act, reprinting the language of the Senate Report, states:

"It was only by the decision of the case of the *United States v. Sandoval* (213 U.S. 28) that the Supreme Court of the United States definitely established the principle that these Indians were wards of the Government....

Up to the time of the decision of the *Sandoval* case in 1913, it had been assumed by both the Territorial and State courts of New Mexico, that the Pueb-

los has [sic] the right to alienate their property. From earliest times also the Pueblos had invited Spaniards and other non-Indians to dwell with them, and in many cases Pueblos and individual Indians attempted to convey lands to non-Indians which under the decision of the *Sandoval* case they were not competent to do." H.R. Rep. No. 787, 68th Cong. 1st Sess. 2 (1924).

It seems clear, then, that if § 17 is not a delegation of power, the 1928 agreement is void.

The terms of § 17 do not provide such authorization to the pueblos to grant their lands. The two clauses of § 17 of the Pueblo Lands Act are joined by the conjunctive "and." To us that means exactly what it says. No alienation of the Pueblo lands shall be made "except as may hereafter be provided by Congress" *and* no such conveyance "shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." Two things are required. First, the lands must be conveyed in a manner provided by Congress. Second, the Secretary of the Interior must approve. As to the first, at the time of the agreement between the Pueblo and Mountain Bell, Congress had provided nothing. Hence, the first condition was not met. The fact that Congress had provided no method makes the approval of the Secretary meaningless. The operation of the second clause depends on compliance with the first clause.

Mountain Bell argues that to give the first clause the meaning which we have approved runs contrary to 25 U.S.C. §§ 311-322 providing among other things for rights of way for telephone and telegraph lines. The answer is that Congress did not extend the application of these statutes to the Pueblo Indians of New Mexico until the Act of

April 21, 1928, see 25 U.S.C. § 322, which was after the Secretary had given his approval to the agreement, with Mountain Bell. The Secretary's approval, given on April 13, 1928 says that it was done pursuant to the provisions of § 17 of the Act of June 7, 1924.

Mountain Bell makes much of the legislative history of the Pueblo Lands Act. We have examined the Senate and House reports of the hearings. Hearings before a subcommittee of the Committee on Public Lands and Surveys, on S. 3865 and 4223, 67th Cong. 4th Session; Hearings before the Committee on Indian Affairs on H.R. 13452 and H.R. 13674, 67th Cong. 4th Session. We find that the most that can be said about them is that they are ambiguous and add nothing to the express language of the statute. If it be conceded that the statute is ambiguous, and we do not feel that it is, then as said in *Bryan v. Itasca County*, 426 U.S. 373, 392:

"... we must be guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe v. Hollowbreast* 425 U.S. 649, 655 n. 7 (1976), that 'statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"

See also *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354.

Mountain Bell says that the administrative construction of the statute supports its contentions. Although the construction put on a statute by the agency charged with administering it is entitled to deference, the courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate or frustrates

congressional policy. *SEC v. Sloan*, 436 U.S. 103, 117-118; and *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746. See also *Plateau, Inc. v. Dept. of Interior*, 10 Cir., 603 F.2d 161, 164. In our opinion, the administrative actions on which Mountain Bell relies violate the plain congressional intent of § 17 of the Pueblo Lands Act.

Mountain Bell argues that the Pueblo's claim is barred by the doctrines of *res judicata* and collateral estoppel because of the dismissal of Mountain Bell as a defendant in *United States v. Brown*, supra, No. 1814 Equity (D.N.M. 1928). The *Brown* suit was filed in November of 1927, under the Pueblo Lands Act of June 7, 1924. Mountain Bell neither entered an appearance in the case nor filed an answer. On April 13, 1928, the Assistant Secretary of the Interior approved an agreement between the Pueblo and Mountain Bell for a telephone lines easement across the Pueblo lands. The approval reads "APPROVED, pursuant to the provisions of Section 17 of the Act of June 7, 1924 (43 Stat. L. 636)."

The United States then filed a motion in the *Brown* case asking the dismissal of Mountain Bell and, as ground for the motion it alleged that,

"subsequent to the institution of this suit said defendant has obtained a deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with Section 17 of the Pueblo Lands Act of June 7, 1924, and that thereby said defendant has obtained, for an adequate consideration, good and sufficient title to the right of way in controversy herein between plaintiff and said defendant."

In its order granting the motion the trial court echoed the language of the motion. It failed to state whether it

was with or without prejudice and it was, therefore without prejudice. See *Ex Parte Skinner and Eddy Corp.*, 265 U.S. 86. *Home Owners' Loan Corp. v. Huffman*, 8 Cir., 134 F.2d 314, 317, says that Rule 41 Fed.R.Civ.P., which adopted this standard, followed long established practice in federal courts and is intended to clarify and make definite that practice.

Mountain Bell argues that the three requirements for application of *res judicata* or collateral estoppel are (1) identity of causes of action, (2) identity of the parties or privity, and (3) a final judgment in the first suit. Only the third need be considered. Mountain Bell says that a voluntary dismissal may be a final judgment for *res judicata* purposes if it addresses and resolves the issue originally in dispute. In making this argument, Mountain Bell relies largely on cases wherein a consent decree was issued. A consent judgment may assume any of several forms. When entered as a decree of dismissal with prejudice, the judgment is generally preclusive. See *Bradford v. Bonner*, 5 Cir., 665 F.2d 680, 682 and *Bloomer Shippers Ass'n v. Illinois Central Gulf Railroad Co.*, 7 Cir., 655 F.2d 772, 777.

The dismissal order in *Brown* indicates neither the court's consideration nor approval of the agreement. The court said only that it appeared to the court that the defendant had secured good and sufficient title by a deed from the Pueblo approved by the Secretary of the Interior "in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924." There is no showing that the court was given a copy of the agreement. There were no findings of fact or conclusions of law.

In *National Life & Accident Insurance Co. v. Parkinson*, 10 Cir., 136 F.2d 506, 509, we said:

"Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked."

We have held that the agreement is invalid under § 17 in the absence of congressional action. Mountain Bell would have us hold that the agreement was valid under the action of the district court in dismissing the case without prejudice and making no effort to decide the validity of the agreement. We reject the arguments of *res judicata* and collateral estoppel.

Pursuant to Rule 56, Fed.R.Civ.P., Mountain Bell moved for a partial summary judgment dismissing the plaintiff's claims for trespass for the period 1928 to date alleging that it is not a trespasser by reason of the April 13, 1928, approval of the Secretary of the Interior. The trial court denied the motion saying, I R. p. 143:

"The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied."

As the Pueblo points out, the commentators generally agree that where there is no genuine issue of fact, the court may enter summary judgment for either party, whether or not such party has made a motion therefor. See 10A Wright, Miller & Kane, *Federal Practice and Procedure: Civil* 2d § 2720, at 29-30, "the weight of authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56."

Mountain Bell's motion does not address the claimed trespass prior to 1928, and hence the plaintiff's claim for damages for the period prior to 1928 remains at issue.

Affirmed.

UNITED STATES COURT OF APPEALS

Tenth Circuit
Office of the Clerk
C404 United States Courthouse
Denver, Colorado 80294

Howard K. Phillips
Clerk

Telephone
(303) 837-3157
(303) 327-3157

May 14, 1984

Ms. Kathryn Marie Krause
Mr. Stuart S. Gunkel
Mr. John R. Stoller
Mountain States Telephone and Telegraph
Suite 1300, 931 14th Street
Denver, Colorado 80202

Mr. H. Perry Ryon
Attorney at Law
P.O. Box 400, Station 733
Albuquerque, New Mexico 87103

Re: 83-1220, Pueblo of Santa Ana vs. Mountain States
Telephone and Telegraph, et al

Dear Counsel:

Enclosed is a copy of the opinion of the Court in the captioned cause. Judgment in accordance with the opinion has been entered today.

Sincerely yours,

/s/ Howard K. Phillips, Clerk

HKP/mju
enc.

(p. 1) IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(Title omitted in printing)

THE ORAL DEPOSITION OF
LOUISA B. SANDO

taken on behalf of the Defendant at 11:00 o'clock A.M. on the 15th day of July, 1981, in the offices of MOUNTAIN-BELL, 201 Third, Northwest, Albuquerque, New Mexico, before me, SOVEIDA GONZALES, Certified Shorthand Reporter and Notary Public.

A P P E A R A N C E S

For the Plaintiff: LUEBBEN, HUGHES AND KELLY
Attorneys at Law
By: Richard W. Hughes
805 Tijeras, Northwest
Albuquerque, New Mexico 87102

For Mountain Bell: MR. STUART S. GUNCKEL
Mountain Bell
931 Fourteenth Street, Room 1300
Denver, Colorado 80202

MR. H. PERRY RYON
Mountain Bell
201 Third, Northwest
Post Office Box 1355, Station 19
Albuquerque, New Mexico 87103

(p. 2) For the Witness: Mr. Jeffery Taylor
Solicitor's Office
Federal Building
Room 1696
500 Gold, Southwest
Albuquerque, New Mexico 87102

I N D E X

Witness	Page
Louisa B. Sando	
Direct Examination by Mr. Gunckel	3
Cross Examination by Mr. Hughes	19

E X H I B I T S

Defendant's Exhibit 1 Marked for Identification	4
(Defendant's Exhibits 2 through 19 subsequently furnished to the Reporter)	

(p. 3) S T I P U L A T I O N

It is hereby stipulated by and between counsel for the respective parties hereto that the within deposition is taken at this time and place pursuant to the Rules of Civil Procedure; that objections other than as to the form of questions are hereby reserved until the time of trial; that the signature of the witness is not waived and that the notice of filing is waived.

* * * * *

LOUISA B. SANDO

having been first duly sworn according to law, upon her oath testified as follows:

D I R E C T E X A M I N A T I O N

BY MR. GUNCKEL:

Q. Would you state your name, please?

A. Louisa B. Sando, S-a-n-d-o.

Q. What is your residence address?

A. 9412 Rio Grande Boulevard, Northwest, Albuquerque, New Mexico, 87114.

Q. By whom are you employed?

A. Bureau of Indian Affairs, Southern Pueblos Agency.

Q. How long have you been so employed?

A. At Southern Pueblos Agency since August of 1961, and I worked one year for the Bureau in Santa Fe prior to that.

Q. What is your present position?

(p. 4) A. Realty Specialist.

Q. How long have you been in that position?

A. Since 1973 and Realty Assistant in '71, and prior to that I was secretary.

Q. As a realty specialist, what are your duties?

A. To review and process any matters concerning Indian land. This can be right-of-way, leases, permits, acquisition, disposal. Anything involving the trust land of the Pueblos has to go through our agency for the ten Southern Pueblos and receive approval before they are valid.

Q. So, you do process real property matters involving the lands of the Southern Pueblos Indians of New Mexico?

A. Yes.

Q. And you are appearing here today, are you not,

as the designated witness pursuant to a subpoena served upon the Department of the Interior by Mountain Bell?

A. Yes.

(Whereupon, Defendant's Exhibit 1 was marked for identification.)

Q. Let me hand you what has been marked as Defendant's Exhibit 1 and ask you if that is a copy of the Subpoena that was served and to which you are responding?

A. Yes, it is.

Q. Now, you indicated that there are ten Pueblos that comprise, or under the supervision of the Southern Pueblos (p. 5) Agency?

A. At this time, yes.

Q. Is there also a Northern Pueblos Agency?

A. Yes.

Q. And how many pueblos are within that agency?

A. Eight.

Q. And do those 18 pueblos constitute all of the pueblos of the Indians of New Mexico?

A. No. There is one more, Zuni, which has its own agency.

Q. Where is that located?

A. South of Gallup

Q. But is the Northern office located here in Albuquerque?

A. It's in Santa Fe.

Q. How many are in Zuni?

A. Just the one pueblo, Zuni Pueblo.

Q. Now, in responding to the Subpoena for the deposition today, have you examined the property records of the Southern Pueblos Agency for purposes of responding?

A. Yes, I have.

Q. And in so examining those records, were you looking for conveyances, sales, grants, leases, titles or interest in or to lands of any of the southern pueblos of New Mexico signed by the Secretary of the Interior pursuant to Section 17 of the Act of June 7, 1924?

A. Yes, that's what I was looking for.

(p. 6) Q. And did you find such conveyances, sales, grants or leases?

A. Yes.

Q. How many did you find?

A. Altogether, rights-of-way are 64.

Q. And those were?

A. Those are rights-of-way and there is one conveyance.

Q. And during what period of time were these rights-of way and conveyances approved?

A. The earliest approval date is shown is October, 1924, and the latest was in December of 1959.

Q. Was that latest one a right-of-way?

A. I believe so. Well, yes. There was only one where it conveyed title to land, so all of the others were rights-of-way.

Q. And all these 64 rights-of-way and one conveyance, they were all approved by the Secretary of Interior?

A. The approval titles were shown variously as Assistant Secretary of Interior, First Assistant Secretary of Interior, and I found one by the Secretary of Interior, himself.

Q. Were all of these rights-of-way and conveyances also signed by the granting pueblos?

A. I believe so. I didn't check for that specifically. That was not one of the questions that Mr. Ortega gave me as having been agreed to with you, that I would be questioned on.

(p. 7) Q. But to your recollection in reviewing them, you do recall that some of these at least were signed by the pueblos?

A. Yes.

Q. What was the purpose for which these 64 rights-of-way were granted and approved?

A. Roads, pipelines, power lines, ditches and canals, railroads, telephone and telegraph.

Q. Now, how many of these rights-of-way were across the land of the Pueblo Santa Ana?

A. Nine.

Q. And during what period were these approved?

A. The earliest was August 13, 1926, and the latest was March 5, 1958.

Q. And all of these nine were approved by the Secretary of Interior, were they?

A. Or his representative, Assistant Secretary.

Q. And what were the purposes for which these nine rights-of-way were granted?

A. Okay. Two were to the Bureau of Reclamation for canals; one was to Southern Union Gas Company for pipelines; one was the New Mexico Highway Department for U.S. 85—it wasn't labeled that initially, but that is now U.S. 85; one to Mountain States Telephone; one to Postal Telegraph Cable Company for a telegraph line; one to the Atchison, Topeka and Santa Fe Railway for the main line built through; one (p. 8) to New Mexico Power Company, which is now Public Service Company, for power line; one to the Santa Fe Northwestern Railway Company for railroad.

Q. Do you have copies of those nine rights-of-way across the Santa Ana lands?

A. Yes, they are all here.

Q. I wonder if we might see those, please, pursuant to the Subpoena.

A. Do you want to start with a specific one, or do you just want to look, because I've gone through and marked various items.

Q. If we could take a moment and go off the record.

(Whereupon, a brief discussion was held off the record.)

MR. GUNCKEL: I have examined the rights-of-way across the Indian lands of the Santa Ana Pueblo that you produced. Can we agree, Counsel, that the witness may, after this deposition, make copies of each of the nine rights-of-way that she has furnished here today, and that they then be sent to the Reporter and marked as Defendant's Exhibit 2 through 10 and attached to the original of the deposition?

MR. HUGHES: Yes.

MR. GUNCKEL: Is that agreeable with you, Mr. Taylor?

MR. TAYLOR: Yes.

Q. Is that fine with you?

(p. 9) A. Yes.

Q. If you will do that, I will appreciate it. The 64 rights-of-way that cross the other southern pueblo lands, did those also include rights-of-way granted to private parties?

A. You said 64 other. That 64 includes Santa Ana. There are 55 other.

Q. Did the 55 other include rights-of-way granted to private parties?

A. No. I have them listed as roads, pipelines, power lines, railroads, telephone and telegraph, ditches, canals. There would be no private individuals involved in that.

Q. To grantees other than governmental agencies?

A. All right. Private corporations, well, the pipelines, the power lines, the railroads, telephone and telegraph, would have been to private corporations.

Q. Thank you. Do you know what the procedures in 1928 for approval of rights-of-way under this Act across Indian pueblo lands in New Mexico was for approval by the Secretary of Interior?

A. Only as it shows in the records in these files. Apparently, the superintendent or his representative from the agency would meet with the tribe and with a representative of the company, and they would agree if they wanted to grant the right-of-way and agree on amount, and then the company (p. 10) submitted its application and drawings of the location of the right-of-way. The superintendent then sent that to Washington to the Commissioner of Indian Affairs with his recommendation that it should be approved. The Commissioner in turn referred it to the Secretary of Interior for approval, and there is correspondence in there indicating these various steps.

Q. All right. And, to your knowledge, do you know if that procedure was followed with reference to the right-of-way that was granted to Mountain Bell, a copy of which is attached to the Supoena that was served?

A. I'd like to look through the files and check this.

Q. If you would.

A. In the file there is a letter dated March 29, 1928, from the Superintendent of Southern Pueblos Agency to the Commissioner of Indian Affairs submitting five copies of the right-of-way, the agreement between Mountain States Telephone and Telegraph and Santa Ana Pueblo. "I was present at a meeting between the Indians and the representatives of the telephone company wherein an agreement was reached to pay to the pueblo \$101.60 for

this right-of-way. We believe this to be a fair price and it is a little higher than the price paid by this company to some of the other pueblos, but this was done for the reason that the Indians disputed the south boundary of their grant as (p. 11) defined by the Pueblo Lands Board, and rather than discuss this matter, the company paid what the Indians asked as a total, which was the equivalent of 80 cents a pole for 127 poles. We therefore recommend that this agreement be approved, and upon its approval, we would request authority to pay this money to the Governor of the pueblo." Signed, Lem, L-e-m A. Towers, Superintendent.

Q. And is there a response to that letter?

A. Well, from there it went to the Secretary of the Interior, a letter signed by the Assistant Commissioner, and that was dated April 11, 1928: "The Honorable Secretary of the Interior: There is transmitted herewith letter dated March 29, 1928 from the Superintendent of Southern Pueblos Agency," transmitting the right-of-way, and then he reports the payment agreed upon, and then he states: "In view of the facts presented, it is recommended that the agreement herewith be approved pursuant to the provisions of Section 17 of the Act of June 7, 1924 (43 Stat. L. 636), and that authority be granted for the Superintendent of the Southern Pueblos Agency to turn over the consideration, amounting to \$101.60, to the Governor of Santa Ana Pueblo for the benefit of the Indians thereof." Signed, E. B. Meritt. I'm not sure about the "B", Meritt. Anyway, Assistant Commissioner, and that carries the approval of the Assistant Secretary under date of April 13, 1928.

(p. 12) Q. Excuse me, is it Mrs. or Miss?

A. Yes, Mrs.

Q. Mrs. Sando, I wonder if you would in your copying make a copy of the letter of March 29, 1928 that you have read so that that may be submitted to the Reporter and attached to the deposition as Exhibit 11, and if you would also make a copy of the letter of April 11, 1928, that you have also just read, and furnish to the Reporter so it may be attached to the deposition and identified as Exhibit 12.

A. All right.

MR. GUNCKEL: Is that agreeable, Mr. Hughes?

MR. HUGHES: Yes.

Q. Is there any other correspondence in the file relative to the approval of Mountain Bell right-of-way by the Secretary of the Interior?

A. No. I went to our Title Plant and copied all the documents that are on record, and the only other thing I found was the actual application from the company dated March 27, 1928, and various attachments to that, and these two letters that I have just read from were also in the Title Plant.

Q. Might I see that letter that you have referred to of March 27, 1928?—Mrs. Sando, if you would also make a copy of that letter of March 27, 1928, together with the attachments, and furnish that also to the Reporter to be identified as Exhibit 13 and attached to the deposition, if (p. 13) that's agreeable with everyone.

MR. HUGHES: Yes. Could you identify that letter again?

A. March 27, 1928, submitting formal application, Mountain States Telephone.

Q. Mrs. Sando, based upon your review of the file and your knowledge of the procedures, does it appear that the procedures in effect at the time in 1928 were followed for the approval of the Mountain Bell right-of-way?

A. It would appear so from the record.

Q. Mrs. Sando, do you know whether there was written delegation of authority from the Secretary of Interior to the Assistant Secretary for approval of the right-of-way at that point in time?

A. No knowledge of that.

Q. Do you know whether, if there was such a written delegation, where it would be filed or where it might be found if it's in existence today?

A. In the Washington office of the Secretary of Interior.

Q. Can you give me any name of any person I might contact or communicate with to see if there is such a thing?

A. I can't say offhand.

Q. Mrs. Sando, do you have any knowledge or information of any entries by Mountain Bell, its agents or contractors onto the right-of-way, copy of which was attached to the (p. 14) Subpoena?

A. Yes. I found two letters, one dated June 18, 1934, addressed to the Governor of Santa Ana from the Superintendent, Lem A. Towers, and he states: "We understand that Mountain States Telephone and Telegraph

Company have cut the boundary fence near the Angostura Arroyo, and on taking this matter up with them, they have suggested that they be permitted to put a gate in this fence, same to be locked and one key to be given to them and one key given to you." And then another letter, February 1st, 1935, to the Governor of Santa Ana from the Superintendent, Lem A. Towers. States in part, referring to the gates again: "In view of the fact that these gates will be locked and no one other than the Indians and company will be able to open them, I see no reason why this permission should not be granted, and I believe it will be advantageous to the Indians because in the past the telephone company has cut the fence, and while they repaired same, it is not as good as having a gate for them to use." And they obviously had to make entries, because the line was installed.

Q. But those are the only entries you have any record of?

A. Yes.

Q. I wonder if you would make copies of each of those letters you have referred to and furnish them to the Reporter to be (p. 15) marked as Exhibits 14 and 15, to be attached to this deposition.

And there's nothing else in the file or other knowledge that you have of any particular entries by Mountain Bell?

A. There's nothing in the file.

Q. And you don't know of anything other than that, specifically, yourself?

A. I would have no reason to.

Q. Mrs. Sando, do you have any knowledge or information of any relocation of the telephone line that was constructed by Mountain Bell on this easement?

A. The records do not indicate any relocations.

Q. So there are no such documents indicating any relocation?

A. No.

Q. Mrs. Sando, do you know of any notice or information that was given to Mountain Bell at any time after the approval of this easement to the effect that the telephone line constructed by Mountain Bell trespassed upon the Santa Ana lands or was not authorized or the right-of-way was not valid?

A. We have nothing in our file on it.

Q. And you don't know of anything? You have no knowledge?

A. Nothing from the Bureau.

Q. Mrs. Sando, have there been any communications or (p. 16) correspondence or discussions with the Pueblo of Santa Ana or its agents or representatives in 1980 or 1981 relative to termination or abandonment by Mountain Bell of this easement?

A. Yes. In October of '80 I received a copy of a Mountain Bell document, dated 03/14/80. It was an agreement between Santa Ana Pueblo and a representative of the telephone company concerning, I believe, taking the poles down. Do you want me to read? "This is a request to enter into an agreement with Santa Ana Pueblo. I propose that Santa Ana Pueblo be allowed to remove all

poles, all crossarms and hardware within Santa Ana reservation of the Denver El Paso Toll Line."

Q. Did your office take any action or do anything upon receipt of that?

A. Yes. We wrote to Dan Lyon, representative of the company, indicating we understood that they had entered into an agreement for the Pueblo to remove these poles and asked if they had relinquished their rights to the line that was in place.

Q. And what date is that letter?

A. December 5, 1980.

Q. Was there any response to that letter?

A. Mr. Lyon responded December 8, 1980: "The remainder of the Las Vegas-Albuquerque section of our Denver-El Paso Line, (p. 17) which crosses the 'San Felipe Pueblo Grant' and the 'El Ranchito Grant,' has been removed and the accompanying rights abandoned."

Q. Is there any additional?

A. "We concur that termination documents, reflecting the aforesaid relinquishments, are in order. When duly executed, please send us copies of same. Our continued full cooperation in all matters of mutual concern is assured."

Q. Was there any further correspondence?

A. February 13, 1981, I turned to Luebben, Hughes and Kelly a copy of the agreement between the telephone company and Santa Ana Pueblo.

Q. Was there any request that accompanied that transmittal?

A. A request? It was a verbal request for a copy of it.

Q. Did they indicate to you why they wanted it?

MR. HUGHES: You can answer yes or no.

A. I don't recall that they said why they wanted it. They just wanted to have a copy of it.

Q. Did you have any further communications or discussions or contacts with Luebben, Hughes and Kelly or representatives of the Pueblo relative to that abandonment of the right-of-way?

A. I believe I talked to Richard Hughes one day and we agreed that any termination documents would be held in abeyance.

(p. 18) Q. Why was that?

MR. HUGHES: I will object to the question on the grounds that it inquires into matters within the attorney-client privilege.

MR. GUNCKEL: I'm not sure I understand, Mr. Hughes. Who is the attorney and who is the client?

MR. HUGHES: I am the attorney and it is our view that actions taken by Mrs. Sando in the course of the trust responsibility relative to legal affairs at Santa Ana are within the scope of attorney-client privilege as defined in New Mexico.

MR. GUNCKEL: So that it's your position that there is an attorney-client relationship between you, as an attorney, and Mrs. Sando, as the client?

MR. HUGHES: To the extent that she is acting on behalf of the United States as trustee for the lands of Santa Ana Pueblo, yes.

MR. GUNCKEL: So that the communications and discussions, then, between you and Mrs. Sando are then covered by the privilege, is your position?

MR. HUGHES: That's our position.

MR. GUNCKEL: And were you also acting, Mr. Hughes, as attorney for the Pueblo of Santa Ana in those discussions?

MR. HUGHES: Yes.

Q. Mrs. Sando, I wonder if you would also make copies of the (p. 19) letters that you have just identified, which were dated March, 1980, from Mountain Bell, regarding the telephone poles, to be identified as Exhibit 16; a copy of the letter dated December 5, 1980 to Mr. Lyon, to be identified as Exhibit 17; a copy of the letter dated December 8, 1980, from Mr. Lyon, to be identified as Exhibit 18; and a copy of the letter dated February 13, 1981 to Luebben, Hughes and Kelly to be identified as Exhibit 19, and furnish those to the Reporter, if you will.

A. All right.

MR. GUNCKEL: I have no further questions.

CROSS-EXAMINATION

BY MR. HUGHES:

Q. Mrs. Sando, did you, in the course of your review of the files prior to attending this deposition, note which

of the rights-of-way, that you've testified to here, are still in existence?

A. Yes.

Q. Of the 64 covering all the southern pueblos, how many of those are still in effect?

A. Fifty-five.

Q. And of the nine at Santa Ana, how many of those?

A. Six are still in effect.

Q. Does that include the Mountain States right-of-way?

A. Yes, it does.

(p. 20) Q. Mr. Gunckel asked you some questions regarding apparent compliance with procedures in the manner in which the Mountain States right-of-way was approved. Was your testimony on that point given with personal knowledge of actual official procedures that were in effect in the United Pueblos Agency or at the time, or are your observations simply from practices reflected from reading the files?

A. Simply the practices that are recorded in the file material.

Q. Do you have any personal knowledge of regulations or official procedures that were in effect as of that time?

A. No.

MR. HUGHES: I have nothing further.

MR. GUNCKEL: I have nothing.

(Whereupon, the taking of the deposition was concluded.)

(p. 21) Rule No. 30 New Mexico Rules of Civil Procedure.

(e) Any changes in form or substance which the witness desires to make shall be entered upon this deposition by the officer with a statement of the reasons given by the witness for making them.

PAGE	LINE	CHANGE	REASON
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(p. 22) I have read the foregoing testimony reported on Pages 3 through 20, inclusive, and the same is a true and correct transcript of said testimony, except such corrections as I have listed on the foregoing page.

Louisa B. Sando

SUBSCRIBED AND SWORN TO before me this
____ day of _____, 19 .

NOTARY PUBLIC

My Commission Expires:

(p. 23) STATE OF NEW MEXICO)
COUNTY OF BERNALILLO)ss.
)

I, SOVEIDA GONZALES, a Certified Shorthand Reporter and Notary Public within and for the County of

Bernalillo, State of New Mexico, do hereby certify that the foregoing Deposition is a complete and accurate record of the testimony given by the witness; that the witness was by me first duly sworn according to law; that I am neither related to nor employed by any of the parties to this action nor the attorneys of record herein; nor have I any financial interest in the outcome of said litigation.

/s/ Soveida Gonzales
Certified Shorthand Reporter
and Notary Public

MY COMMISSION EXPIRES:
3/28/82

Cost of the original to the Defendant: \$_____

DEFENDANT'S EXHIBIT 1—Subpoena and Notice of
Deposition Omitted in Printing

DEFENDANT'S EXHIBIT 2

APR 23 1928

The Honorable

The Secretary of the Interior

Sir:

On July 11, 1924, approval was given to the application of the Santa Fe Northwestern Railway Company for railroad right of way across the Santa Ana and Zia Indian Pueblo land grants, in New Mexico, and similar application of the company affecting the El Ranchito land grant of the Santa Ana Pueblo was approved November

1, 1924, under the Act of March 2, 1899 (39 Stat. L., [#illegible]), as amended.

There is now transmitted letter dated April 14, 1926, from Messrs. Hanna & Wilson, of Albuquerque, New Mexico, attorneys for the company, presenting deeds executed by the Governor, Lt. Governor and members of the Council of the Pueblos of Santa Ana and Zia, respectively confirming and conveying to the company the right of way previously granted by the Department.

Attached to each deed is the certificate of the Supervisor in Charge of the Southern Pueblos Agency to the effect that the deed was executed in the presence of his representative and with his full knowledge and consent, and recommending that the deed be approved.

The deeds seem to be executed in proper form and in view of the record it is respectfully recommended that each instrument be approved in accordance with Section 17 of the Act of June 7, 1924 (43 Stat. L., 636) and returned to this Office for recordation and delivery.

Respectfully,
[word illegible] Commissioner

4-21-chi

Deeds approved
as recommended:

[Signed] John H. Edwards

Assistant Secretary

(Also part of Defendant's Exhibit 2 was the Right of Way Agreement between the Pueblo of Santa Ana and Mountain Bell, dated February 23, 1928. This can be found at J.A. 38-43.)

DEFENDANT'S EXHIBIT 3

THIS INDENTURE, made this /s/ 5th day of /s/ October, 1928, between the Pueblo of Santa Ana, a body politic and corporate within the State of New Mexico, first party, and The Atchison Topeka and Santa Fe Railway Company, a Kansas corporation, second party:

RECITALS:

Second party has occupied, for many years, the parcels of land hereinafter described for railroad right of way and station purposes. The question has arisen between said parties as to the right of the second party in and to said parcels of land, and suit was recently filed by the United States of America, as guardian for first party, touching the right of second party to said parcels, said suit being numbered 1814 in Equity on the Docket of the District Court of the United States for the District of New Mexico. The parties desire to settle and adjust any controversy which may exist, and, in order to accomplish this result, the following grant, for the consideration wherein named, is hereby made by first party to second party:

[word illegible]

[2 words illegible] of the premises and of the payment by second party of the sum of /s/ One Hundred Thirty-Dollars (\$/s/ 130/00), lawful money of the United States of America, receipt whereof is hereby acknowledged, first party hereby grants and conveys to second party, its successors and assigns, an easement and right of way for railroad and transportation purposes over and across the following described land:

All that certain tract of parcel of land situated in and being a part of the Santa Ana Pueblo or El Ranchito grant in Township 18 North, Range 4 East of the New Mexico Principal Meridian in Sandoval County, State of

New Mexico, and being more particularly described as follows:

A strip of land [word illegible] feet in width, lying [word illegible] feet on each side of the centerline of the main track of The Atchison, Topeka and Santa Fe Railway Company (as said train track is now located and contracted over and across the Santa Ana Pueblo or El Ranchito Grant) and entering from the south boundary line of the San Felipe Pueblo Grant (said boundary line also being the north boundary line of the Santa Ana Pueblo or El Ranchito Grant) in a southwesterly direction to the south boundary line of the Santa Ana Pueblo or El Ranchito Grant, the center line of the main track of the Atchison, Topeka and Santa Fe Railway Company over and across the Santa Ana Pueblo or El Ranchito Grant being more particularly described as follows:

Commencing at a [2 words illegible] boundary barrier on the south boundary line of the San Felipe Pueblo Grant, said marker being marked [word illegible] mi. (6 miles; thence in a westerly direction along said south boundary line (assuming for the purpose of this description that said south boundary line has a bearing of north 80 degrees 54 minutes west, [# illegible] feet to an intersection with the center line of said main track at its profile station 1553 +8.9 feet; thence south 33 degrees 15 minutes west along center line of said main track, a distance of [# illegible] feet, more or less, to an intersection with the south boundary line of the Santa Ana Pueblo or El Ranchito Grant, said south boundary line intersects center line of said main track at its profile station 1662 plus 40 feet, and has a bearing of north [# illegible] degrees [# illegible] minutes west.

The foregoing described tract of land contains an area of 34.44 acres more or less.

The extent of the rights hereby granted is the same as those which may be acquired by [2 words illegible] company through the public [word illegible] of the [2

words illegible] under and by compliance with the Act of Congress [4 words illegible] statutes at Large [# illegible].

In Witness Whereof, the first party has executed this indenture the day and year first written, by and through the undersigned, having the duly selected and authorized agents of said pueblo selected, in convention and bled, to execute said document, and constituting the governing authorities of first party.

PUEBLO OF SANTA ANA

By /s/ Emiliano Otero
Its Governor

/s/ Jose Reye Leon
Its Lieutenant Governor

/s/ Pueblo has no Secy's
Secretary

/s/ Porfirio Montoyo

/s/ Daniel Otero

/s/ Hilario Sanchez

/s/ Jose Ray Helo

/s/ Rafael Gallegos

Witnesses

[name illegible]

State of New Mexico)
) : ss
County of /s/ Bernalillo)

On this /s/ 5th day of /s/ October, 1928, before me appeared /s/ Emiliano Otero, to me known to be the Governor; /s/ Jose Reye Leon, to me known to be the Lieutenant Governor; _____, to me known to be the Secretary, and /s/ Porfirio Montoya, /s/ Daniel Otero, /s/ Hilario Sanchez, /s/ Jose Rey Helo and /s/ Rafael Gallegos, each and all personally known to me to be the Councilmen of the Pueblo of Santa Ana, and acknowledged that they were each and all said officers of said pueblo; that the Pueblo of Santa Ana has no corporate seal; that said instrument was executed as the free act and deed of the signers of same, and also the free act and deed of said Pueblo of Santa Ana.

Witness my hand and notarial seal the day and year in this certificate first written.

/s/ Frances Jay Rusuro
Notary Public

My commission expires: /s/ Nov. 19, 1931

THIS INDENTURE made this 22nd day of March, 1926, by and between the PUEBLO DE (OF) SANTA ANA, a corporation organized and existing under and by virtue of the laws of the State of New Mexico, party of the first part, and the SANTA FE NORTH-WESTERN RY. CO., organized and existing under and by virtue of the laws of the State of New Mexico, party of the second part, WITNESSETH: that

WHEREAS on March 8, 1923, the Department of the Interior granted to the party of the second part permission to proceed with the construction of a railroad, pending approval of maps of definite location and showing required by railroad right-of-way Act of March 2, 1899, and acts amendatory thereof; and

WHEREAS, the foregoing requirements of the Department of the Interior having been fully complied with, the Secretary of the Department of the Interior did on July 11, 1924, approve the application of the party of the second part and the maps of definite location of said right-of-way, together with the schedule of damages determined by the appraisers in the manner provided in the Act of March 2, 1899, and the acts amendatory thereof; and

WHEREAS, on March 21, 1924, the party of the second part, did by its President, G. A. Porter, under authority of its Board of Directors, execute a stipulation binding itself, its successors and assigns, in the matter of use and occupancy of said lands for right-of-way purposes in conformity with the provisions of the Act of Congress of March 2, 1899, and acts amendatory thereof, which said stipulation was subsequently approved by the Secretary of the Interior on July 11, 1924, this stipulation being hereto attached and made a part hereof; and

WHEREAS, on March 21, 1924, the Governor of said Pueblo de (of) Santa Ana, Daniel Otero, and the Secretary and interpreter, Porfirio Montoya, and two principals of the Pueblo, Miguel Montoya Silva and Nasario Trujillo, for and on behalf of said Pueblo de (of) Santa Ana, officially accepted the aforementioned schedule of damages in full compensation of damages sustained through the construction of said railway; and

WHEREAS, on July 11, 1924, the Secretary of the Interior authorized the acceptance of the sum of two hundred ninety-seven and two-hundredths dollars (\$297.02), fixed by the appraisal and schedule of damages, in full settlement of the damages caused by the construction of said railway, which said sum was tendered and accepted under said authority; and

WHEREAS, the Governor and Council of the Pueblo de (of) Santa Ana have regularly called a meeting of the Council and other residents and inhabitants of the Pueblo de (of) Santa Ana for the purpose of authorizing the execution of a grant of the right-of-way across the lands of said Pueblo, as hereinafter described, in the nature of an easement; and

WHEREAS, after full and careful consideration of all the foregoing matters and things herein set forth, the Governor, Lieutenant-Governor, and members of the Council of the said Pueblo de (of) SANTA ANA were authorized and directed to execute and deliver this conveyance of a right-of-way in the nature of an easement across the lands of the said Pueblo de (of) Santa Ana;

NOW, THEREFORE, for and in consideration of the sum of two hundred ninety seven dollars and two cents (\$297.02) paid and accepted under the schedule of damages above referred to, the receipt of which is hereby acknowledged, said party of the first part hereby grants, bargains, sells, conveys, and warrants, to the party of the second part, its successors and assigns forever, a right-of-way and easement one hundred (100) to two hundred (200) feet in width, as hereinafter described, with the right, privilege and authority to the said party of the second

part, its successors, assigns, lessees and tenants, to construct, operate and maintain a railroad over, through, and across the following described lands situate in Sandoval County, State of New Mexico, and within the said Pueblo de (of) Santa Ana Grant, to-wit:

A strip, piece or parcel or land 100 ft. in width; with the exception of such increases and decreases as are hereinafter noted; same being 50 ft. on either side of the center line of the Santa Fe Northwestern Ry. as is now located and constructed over and across the Santa Ana Pueblo Grant, in Sandoval County, New Mexico, and extending from Engineer's location station 421 plus 32.6 to Engineer's location station 807 plus 72.7, said center line and width of right-of-way being more particularly described as follows:

Beginning at a point on the west line of the Santa Ana Pueblo Grant, said point being Engineer's location station 421 plus 32.6 and lying south 2775.0 ft. of the government monument marking the N.W. corner of said grant; thence S. $47^{\circ}31'$ E., 1097.5 ft. to Engineer's location station 431 plus 00, at which point the width of right-of-way increases at right angles to said center line, to 100 ft. on either side of said center line; thence S. $47^{\circ}31'$ E. 1700.0 ft. to Engineer's location station 448 plus 00, at which point the width of right-of-way decreases at right angles to said center line to 50 ft. on either side of said center line; thence S. $47^{\circ}31'$ E. 1423.2 ft. to Engineer's location station 462 plus 23.2; thence along the arc of a $2^{\circ}00'$ curve to the right 1308.3 ft. to Engineer's location station 475 plus 31.5; thence S. $21^{\circ}21'$ E. 768 ft. to Engineer's location station 483 plus 00, at which point the width of right of way increases at right angles to said center line, to 100 ft. on either side of said center line; thence S. $21^{\circ}21'$ E. [# illegible] ft. to Engineer's location station 488 plus 00, at which point the width of right-of-way decreases at right angles to said center line to 50 ft. on either side of said center line; thence S.

$21^{\circ}21'$ E. 1700 ft. to Engineer's location station 505 plus 00, at which point the width of the right-of-way increases at right angles to said center line, to 100 ft. on either side of said center line, thence S. $21^{\circ}21'$ E. 700.0 ft. to Engineer's location station 512 plus 00, at which point the width of the right-of-way decreases at right angles to said center line to 50 ft. on either side of said center line; thence S. $21^{\circ}21'$ E. 3100.0 ft. to Engineer's location station 543 plus 00, at which point the width of right-of-way increases at right angles to said center line to 75 ft. on either side of said center line; thence S. $21^{\circ}21'$ E. 1161.9 ft. to Engineer's location station 554 plus 61.9; thence on the arc of a $2^{\circ}00'$ curve to the left 238.1 ft. to Engineer's location station 557 plus 00, at which point the width of the right-of-way decreases at right angles to said center line to 50 ft. on either side of the center line; thence continuing on the arc of said $2^{\circ}00'$ curve to the left 785.2 ft. to Engineer's location station 564 plus 85.2; thence S. $41^{\circ}49'$ E. 314.8 ft. to Engineer's location station 568 plus 00, at which point the width of the right-of-way increases, at right angles to said center line, to 75 ft. on either side of said center line; thence S. $41^{\circ}49'$ E. 7204.1 ft. to Engineer's location station 640 plus 04.1; thence on the arc of a $1^{\circ}00'$ curve to the left, 900.0 ft. to Engineer's location station 649 plus 04.1; thence S. $50^{\circ}49'$ E. 1895.9 ft. to Engineer's location station 668 plus 00. at which point the width of right-of-way decreases, at right angles to the center line, to 50 ft. on either side of said center line; thence S. $50^{\circ}49'$ E. 2681.8 ft. to Engineer's location station 694 plus 81.8; thence on the arc of a $4^{\circ}00'$ curve to the left 813.7 ft. to Engineer's location station 702 plus 95.5, at which point the right-of-way increases at right angles to said center line, to 100 ft. on either side of said center line; thence S. $83^{\circ}22'$ E. 2357.8 to Engineer's location station 726 plus 53.3, at which point the width of the right-of-way decreases, at right angles to said center line, to 50 ft. on either side of said center line; thence on the arc of a $1^{\circ}00'$ curve to the right 1090.0 ft. to

Engineer's location station 737 plus 43.3; thence S. 72°28' E. 4048.2 ft. to Engineer's location station 785 plus 57.4; thence on the arc of a 2°00' curve to the right 879.2 ft. to Engineer's location station 794 plus 36.6; thence S. 54°53' E. 163.4 to Engineer's location station 796 plus 00, at which point the width of right-of-way increases, at right angles to said center line, to 75 ft. on either side of said center line; thence S. 54°53' E. 612.9 ft. to Engineer's location station 802 plus 12.9; thence on the arc of a 1°30' curve to the left 559.8 ft. to Engineer's location station 807 plus 72.7, same being on the south line of said grant and lying west 1479.1 ft. from the government monument marking the S.E. corner of said grant.

The above described strip, piece or parcel of land contains 113.75 acres.

The original tracing and map of the survey of said right-of-way made January 27, 1923 by V. C. Coffey, Chief Engineer, have been filed with and approved by the Secretary of the Interior, on July 11, 1924. A blue print copy of same map being hereto attached and made a part thereof.

together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or any wise appertaining.

TO HAVE AND TO HOLD the above described premises for right-of-way (illegible) in the nature of an easement and every part thereof with the appurtenances, unto the said party of the second part, its successors and assigns, to their sole use, benefit and behoof forever; Provided that said described land shall revert to the party of the first part whenever it shall no longer be used by the party of the second part, its successors, assigns, lessees and tenants, for a railroad right-of-way.

IN WITNESS WHEREOF, the said Pueblo de (of) Santa Ana, the party of the first part, has caused these

presents to be executed the day and year first above written by its Governor, Lieutenant Governor, and a majority of the members of its Council.

WITNESSES TO ALL
SIGNATURES.

PUEBLO DE (OF)
SANTA ANA

Manuel Meia
Philip Jayals
Lewis R. McDonald
R. R. Krinna
Members of Council
Jose Cruz Montoya
His Mark (fingerprint)
Porfirio Montoya
Victoria Montoya
Jose Emilio Raton
Antonio Gallegos
His Mark (fingerprint)
Jose Antonio Cristobal
His Mark (fingerprint)
Nasario Trujillo
His Mark (fingerprint)

By Hilario Sanchez
Governor
Santiago Tenario
Lieutenant Governor
Miguel Silva
His Mark
Daniel Otero
Isidro Nuranjo
His Mark (fingerprint)
Rafael Gallegos
Hijinio Garcia
His Mark (fingerprint)
Jose Porfinio
Hinio Manchego
His Mark (fingerprint)
Jose Rey Helo
His Mark (fingerprint)
Florencio Roman
His Mark (fingerprint)
Jose Bobe Pino
His Mark (fingerprint)
Crusito Loretto
His Mark (fingerprint)
Cristo Raton

DEFENDANT'S EXHIBIT 4

On this 22nd day of March, 1926, before me personally appeared Hilario Sanchez, the Governor, and Santiago Tenorio, the Lieutenant Governor, and Miguel Silva, Daniel Otero, Isidro Naranjo, Rafael Gallegos, Hijinio Garcia Jose Porfirio, Hinio Manchego, Jose Rey Helo, Florencio Roman, Jose Bobe Pino, Cristo Raton, Jose Crez Montoya, Jose Emilio Raton, Antonio Gallegos, Crusito Loretto Porfirio Montoya, Valentino Montoya, Jose Antonio Cristobal and Nasaris Trujillo, members of the Pueblo Council of the Pueblo de (of) Santa-Ana, a corporation, each to me personally known, who being by me duly sworn, did say that he is the officer designated as such in the foregoing instrument, and that said instrument was signed and sealed in behalf of said corporation by authority of a majority of the members attending a meeting called for the purpose of authorizing the execution of said instrument, and said Hilario Sanchez, the Governor, and Santiago Tenorio, Lieutenant Governor, and the members of said Council whose names are affixed to the foregoing instrument, each for himself and not one for the other, acknowledged said instrument to be the free act and deed of said corporation.

/s/ B. B. Weidirich
Notary Public

My commission expires March 22, 1929

WHEREAS, the Southern Union Gas Company, a corporation, has made an application to the duly elected Governor of Pueblo de Santa Ana for a right-of-way in the nature of an easement for a pipe line crossing the lands of the party of the first part, and,

WHEREAS, the Governor has regularly called a meeting of the Council and other residents and inhabitants of the said Pueblo for the purpose of considering said application, and,

WHEREAS, after careful consideration the Governor and the Council have resolved to enter into a contract with the said Southern Union Gas Company, a corporation, the party of the second part herein, granting a right-of-way in the nature of an easement for said pipe lines across the lands of the said Pueblo;

NOW, THEREFORE, for and in consideration of the sum of Two Hundred Twenty and 38/100 (\$220.38) Dollars, and other valuable considerations in hand paid to the party of the first part by the party of the second part, the receipt of which is hereby acknowledged, the said party of the first part hereby agrees, bargains, sells, conveys

and warrants to the party of the second part, its successors and assigns, for the period of twenty (20) years, a right-of-way and easement twenty-five (25) feet in width with the right, privilege and authority to the said party of the second part, its successors, assigns, lessees and tenants, to construct, erect, operate and maintain a pipe line or lines for the purpose of transmitting and distributing natural gas in, on, along, over, through, across or under the following described lands situated in Sandoval County, State of New Mexico, to-wit:

TRACT 1

Beginning at station 729-07 on the center line survey of said pipe line, a point on the West boundary of El Ranchito Grant N.16°39'E., 809.8 feet distant from the southwest corner of said Grant; said beginning point being situate in Section 30, Township 13 North, Range 4 East, N.M. P.M.; running thence from said beginning station N.86°28'E., 89 feet to station 729-96 on said center line survey, a point at the westerly end of State Highway bridge No.434; thence S. 69°47'E., running upon said bridge 1030 feet to station 740-26 on said center line survey, a point at the Easterly end of said bridge; thence S.79°32'E., 974 feet to station 750 on said center line survey; thence S.83°02'E., 1746 feet to station 767-46 on said center line survey, a point on the South boundary of said El Ranchito Grant N.89°51'E., 743 feet distant from the corner marking the intersection of the west boundary of the Felipe Gutierrez, or Town of Bernalillo Grant, with said south boundary of said El Ranchito Grant; said terminal point being situate in Section 29 of said Township 13 North, Range 4 East, N.M.P.M.; the length of line as herein described being 3839 feet, more or less.

TRACT 2

Beginning at station 870-44 on the center line survey of said pipe line, a point on the south boundary of El

Ranchito Grant N.89°54'E., 144.6 feet distant from the Four (4) Mile Corner on said Grant boundary; said point of beginning being situate in Section 21, Township 13 North, Range 4 East, N.M.P.M.; running thence from said beginning station N.36°24'E., 7156 feet to station 942 on said center line survey; thence N.17°19'E., 2256 feet to station 964-56 on said center line survey; thence N.1°39'E., 659 feet to station 971-15 on said center line survey; thence N.29°09'E., 285 feet to station 974 on said center line survey; thence N.37°43'E., 129 feet to station 975-29, a point on the south boundary of San Felipe Pueblo Grant N.86°58'W., 389.9 feet distant from the Six (6) Mile Corner on said last named Grant boundary; thence continuing N.37°43'E., 220 feet to station 977-49 on said center line survey, a point on the easterly boundary of Private Claim No. 4 in said Grant N.58°46'E., 19 feet distant from corner No. 6 of said Private Claim No.4; thence entering said Private Claim No.4 and continuing N.37°43'E., 51 feet to station 978 on said center line survey; thence N.37°28'E., across said Private Claim No. 4 a distance of 2200 feet to station 1000 on said center line survey; thence N.42°41'E., continuing across said Private Claim No. 4 a distance of 1034 feet to station 1010-34 on said center line survey, a point on the north boundary of said El Ranchito Grant N.74°15'W., 281 feet distant from Angle Point No. 6 on said last named Grant boundary; said terminal point being situate in Section 10 of said Township 13 North, Range 4 East, N.M.P.M.; the total length of line 83, herein described being 13,990 feet; the total length of line within said Grant, excepting therefrom the area contained in said Private Claim No. 4, being 10,705 feet, more or less.

The said Grantor is to fully use and enjoy the said premises except for the purposes hereinbefore granted to the said Grantee, which hereby agrees to bury all pipes to a sufficient depth so as not to interfere with cultivation of soil, and to pay any damages which may arise to growing crops or fences from the construction, maintenance, and operation of said pipe lines; said damages, if

not mutually agreed upon, to be ascertained and determined by three disinterested persons one thereof to be appointed by the said Grantor, one by the said Grantee, and the third by the two so appointed as aforesaid, and the written award of such three persons shall be final and conclusive. Should more than one pipe line be laid under this grant at any time, the sum of twenty-five (25¢) cents per lineal rod for each additional line shall be paid, besides the damages above provided for.

Upon written application to the Grantee at Dallas, Texas, the Grantee will make or cause to be made, a tap on any gas pipe line constructed by Grantee on Grantor's premises for the purpose of supplying gas to the Grantor for domestic use only, the cost of meter and saddle to be borne by said Grantee, and all other expenses, including fittings, to be borne by Grantor, gas to be measured and furnished at the main line of Grantee at the same price and under the same rules and regulations as prevail in the nearest city or town where Grantee is supplying gas.

The easement herein granted is subject to the rights-of-way granted or to be granted to the Middle Rio Grande Conservancy District for construction of any ditches, drains, flumes and (or) all other works for the use or benefit of the Grantor and the Grantee herein consents and agrees to bear and pay the reasonable costs of any additional work or expense or (illegible) incurred by the Middle Rio Grande Conservancy District in its construction which may be brought about by the granting of this easement and construction of the proposed pipe line for transporting gas.

The consideration first above recited as being paid to Grantor by Grantee is in full satisfaction of every right

hereby granted. All covenants and agreements herein contained shall extend to and be binding upon the respective heirs, legal representatives, successors and assigns of the parties hereto.

It is hereby understood that party securing this grant in behalf of Grantee is without authority to make any covenant or agreement not herein expressed.

WITNESS the execution hereof on this 12th day of September, A.D., 1930/

WITNESSES:

PUEBLO DE SANTA ANA

By Hilario Sanchez
Governor

Valentino Montoya
Lt. Governor

Emiliano Otero

Jose Rey Helo

Jose Cristo Raton

Florensio Roman
His Mark (fingerprint)

Jose Cruz Montoya
His Mark (fingerprint)

Elizio Andre
His Mark (fingerprint)

Dudley Geruell

Kay Rhodes

Doreen Epsoell

Roy Rhodes

Dudley Roanell

Roy Rhodes

SOUTHERN UNION GAS COMPANY,
By O. W. Murchison
President

ATTEST:

K. M. Murchison
Secretary

BEFORE ME, the undersigned authority, on this day personally appeared C. W. Murchisen and K. Murchisen, who, being by me duly sworn, did say that they are President and Secretary respectively of the Southern Union Gas Company, a corporation, and that the seal affixed to said instrument is the corporate seal of said corporation and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors

THIS AGREEMENT, made this 27th day of February, A. D. 1928, by and between the Pueblo de Santa Ana, a New Mexico corporation, by *Emiliano Otero*, the Governor of the Pueblo de Santa Ana, *Jose Reye Leon*, Lieutenant-Governor of the Pueblo de Santa Ana, *Estoven Lujan*, *Jose Cruz Montoya*, *Porforio Montoya*, *Hilario Sanchez*, and _____, constituting the council and principal men of the Indian Pueblo de Santa Ana, for and on behalf of the inhabitants and residents and land owners of the Pueblo de Santa Ana, party of the first part;

and the Postal Telegraph-Cable Company of New Mexico, a corporation organized and existing under the laws of the State of New Mexico, and having its office and principal place of business at Albuquerque, in the county of Bernalillo and state of New Mexico, party of the second part, WITNESSETH:

WHEREAS, The party of the second part, by its predecessor and predecessors in interest and title, during the year 1894, constructed line of telegraph over the lands and premises of the Pueblo de Santa Ana and erected poles, cables, and wires, and has maintained the said line of telegraph with the poles, cables, and wires down to the present time, and

WHEREAS, The said party of the second part, by and through its predecessor and predecessors in interest and ownership, was permitted and granted a right to construct and erect said line or telegraph and erect poles and string wires and conduits, as aforesaid, under and by virtue of the authority given and granted to the said party of the second part and its predecessors in title and interest, which said permit and permission was dated at Bernalillo, New Mexico, May 28, 1894, and which was signed by the Governor of the Pueblo de Santa Ana, a copy of which said permit and authority is as follows, to-wit:

Bernalillo, N.M. May 22nd, 1894

IN CONSIDERATION of the sum of Fifteen & 25/100 Dollar, receipt of which is hereby acknowledged, I hereby grant to the

POSTAL TELEGRAPH-CABLE COMPANY,
Its successors or assigns, the right to construct and maintain and securely brace and guy a line of Telegraph poles and fixtures, and string wires thereon, and trim trees, on

and along the lands adjacent or close to the right of way of the A. T. & S. F. R. R., situated in Santa Ana Township, Bernalillo County, State of New Mexico; said Telegraph Company to be liable for all damages to fences and crops injured in the construction or maintenance of said line,

Witness:

C.R. Lewis

Znis x Vunuga
His Mark

WHEREAS, Under an Act of Congress entitled, "An Act to Quiet Title to Lands Within Indian Pueblo Land Grants and For Other Purposes," which said Act was approved on the 7th day of June, 1924, there was established a board known as the Pueblo Lands Board for the purpose of quieting title to the various parcels and tracts of land in the State of New Mexico occupied by the Pueblo Indians of New Mexico, and

WHEREAS, The said Pueblo de Santa Ana, the party of the first part, is the owner of said lands located in the County of Sandoval, known as El Ranchito Grant, and

WHEREAS, The said Pueblo de Santa Ana, the party of the first part, is a corporation created under the laws of the State of New Mexico, and the persons executing this instrument constitute and are the governing body and governing officers of the party of the first part, with full power and authority to execute for and on behalf of the said party of the first part instruments conveying easements for rights of way across the lands owned and controlled by the said party of the first part, and

WHEREAS, It is the desire of the party of the first part to execute for itself and on behalf of the inhabitants thereof, an instrument granting to the party of the second part the right and privilege to construct, maintain, and operate a telegraph pole line, including necessary poles,

cables, conduits, wires, and fixtures, with the right to permit the attachment of the wires of any other party and right to trim trees along said line so as to keep the wires cleared at least fifty inches, and to set the necessary guy and brace poles and anchors, and to attach thereto the necessary guy wires over, along, and across those said lands situate within the boundaries of El Ranchito Grant above-mentioned, the exact location of which is hereinbefore specifically described and shown on the map attached hereto and made a part hereof.

NOW THEREFORE, In consideration of the premises and further consideration of \$70.00, and other good and valuable considerations in hand paid to the said party of the first party by the party of the second part, the receipt whereof is hereby acknowledged by the party of the first part, for itself and on behalf of the inhabitants of the Pueblo de Santa Ana, does hereby grant, bargain, sell, and convey unto the party of the second part, its successors and assigns, an easement to construct, maintain, and operate a telegraph pole line, including the necessary poles, cables, conduits, wires, and fixtures, with the right to permit the attachment of the wires of any other party and the right to trim any trees along said line so as to keep the wires cleared at least fifty inches, and to set the necessary guy and brace poles and anchors, and to attach thereto the necessary guy wires, over, along, and across the following described property, known as El Ranchito Land Grant, situate within the County of Sandoval and State of New Mexico, the exact location of said right of way being more particularly described as follows, to-wit:

Beginning at station 0 plus 00 of the line herein described, a point on the Southerly boundary of the

El Ranchito Grant S. 89 deg. 58'W. 689.36 feet from the 4 mile corner on said Grant line, and running thence N. 35 deg. 03'E., 4986.5 feet to station 49 plus 86.5; thence N. 33 deg. 10'E., 3291 feet to station 82 plus 77.5; thence N. 33 deg. 06'E., 1965.1 feet to station 102 plus 42.6; thence S. 35 deg. 28'E., 191.6 feet to station 104 plus 24.2; thence N. 33 deg. 23'E., 225.2 feet to station 106 plus 59.4, a point on the southerly boundary of the San Felipe Pueblo Grant, N. 86 deg. 58'E., [word illegible] feet from the 6 mile corner on said San Felipe Pueblo Grant line; thence continuing across the area in conflict between the El Ranchito Grant and the San Felipe Pueblo Grant N. 33 deg. 11'E., 281.6 feet to station 109 plus 41.0; thence N. [# illegible] deg. 12'E., 2184.2 feet to station 130 plus 95.2; thence N. 35 deg. 16'E., 218.3 feet to station 133 plus 13.5; thence N. [# illegible] deg. 22'E., 567.8 feet to station 136 plus 81.3; thence N. 44 deg. 19'E., 278.9 feet to station 139 plus [# illegible], a point on the northerly boundary of said El Ranchito Grant S. 74 deg. 16'E., 567.4 feet from [word illegible] Corner No. 5 on said Grant line.

It is hereby understood and agreed that only an easement for the construction and maintenance of telegraph line, and the fixtures thereto attached, is hereby granted, and that the party of the first part and the inhabitants of the said Pueblo de Santa Ana retain the right to cultivate said land or otherwise use it in any manner whatsoever, provided such cultivation and such use does not interfere with the operation of said pole line and fixtures thereon.

It is further understood that the party of the second part, its successors and assigns, shall have the right of ingress and egress to do any and all work necessary to properly maintain and operate said line or lines.

IN WITNESS WHEREOF, The said party of the first party has caused this instrument to be executed by its duly authorized officers for itself and on behalf of the

inhabitants of the said Pueblo de Santa Ana, and the said party of the second part has caused this instrument to be executed by its duly authorized officers the day and year first above written.

THE PUEBLO DE SANTA ANA

BY /s/ Emiliano Otero
Governor

/s/ Jose Reye Leon

/s/ Estevan Lujan

/s/ Jose Cruz Montoya

/s/ Porfirio Montoya

/s/ Hilario Sanchez
Party of the First Part,

POSTAL TELEGRAPH-CABLE
COMPANY

BY /s/ Edward Reynolds
Its President
Party of the Second Part.

Attest:

[name illegible]
Secretary

STATE OF NEW MEXICO)
): ss
COUNTY OF BERNALILLO)

On this 27th day of February, 1928, before me appeared *Emiliano Otero*, Governor of the Pueblo de Santa Ana, *Jose Reye Leon*, lieutenant governor of the Pueblo de Santa Ana, *Estevan Luijan*, *Jose Cruz Montoya*, *Porfirio Montoya*, and *Hilario Sanchez*, constituting the council and principal men of the Indian Pueblo de Santa Ana, to me personally known and before me duly sworn, did say

that they are the Governor, lieutenant governor, and the principal men of the Pueblo de Santa Ana, respectively, and that the said instrument was signed by them on behalf of the said Pueblo de Santa Ana and the inhabitants thereof, by authority of its board of principals made and provided, and the said *Emiliano Otero*, *Jose Reye Leon*, *Estevan Luijan*, *Hilario Sanchez*, *Jose Cruz Montoya*, and *Porfirio Montoya* acknowledged said instrument to be the free act and deed of said Pueblo de Santa Ana, and their free act and deed, and that the said Pueblo de Santa Ana has no corporate seal, and that said instrument was read and interpreted to each of them, and that each of them knows the contents thereof.

IN WITNESS WHEREOF, I hereunto set my hand and affix my official seal.

/s/ Frances L. Hussey
Notary Public
Bernalillo County

My commission expires: 11/25/31

STATE OF NEW YORK,)
): ss.
COUNTY OF NEW YORK.)

On the /s/ 14th day of /s/ March, 1928, before me personally appeared, /s/ *Edward Reynolds*, to me personally known, who being by me duly sworn, did say that he is the president of the Postal Telegraph-Cable Company, and that the seal affixed on said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of the said corporation by authority of its Board of Directors, and said /s/ *Edward Reynolds*, acknowledged said instrument to be the free act and deed of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

/s/ John J. [name illegible]
Notary Public
State of New York County of New York
Notary Public Queens County No. 651
Queens County Recorder No. 2543
Certificate filed in New York
County No. 327
New York County Register's No. 9281
My Commission expires March 30, 1929

My commission expires /s/ March 30, 1929

[word illegible]

DEPARTMENT OF THE INTERIOR
APR -4, 1928, 1928

Approved, pursuant to the provisions of Section 17, of the Act of June 7, 1924 (43 Stats. L., 636).

/s/ John H. Edwards
Assistant Secretary
Office of Ind. Affs.
Land Div.
Recorded in misc.
Deed Book Vol. 24,
page 68
April 26, 1928

DEFENDANT'S EXHIBIT 6

SEP 15 1928

The Honorable

The Secretary of the Interior

(Through the Commissioner
of the General Land Office)

Sir:

There are transmitted herewith agreement bearing approval of the special attorney for the Pueblo Indians entered into by and between the Board of County Commissioners of Sandoval County, New Mexico, and the Pueblo of Santa Ana whereby the Pueblo [word illegible] grants a right of way for public highway designated Federal Aid Project No. 88B, through its El Ranchito land grant in consideration of the advantages which the road will be to the Pueblo, and to its property, and payment of the sum of \$850 plus 3¢ per cubic yard for all gravel taken from such Pueblo lands.

The Superintendent of the Southern Pueblos Agency reports that the sum of \$850 has been deposited with him and recommends that the agreement be approved.

By letter of August [# illegible], 1926, the attention of the superintendent was called to the fact that the accompanying map of definite location [word illegible] that the proposed road in to cross the Pueblo of San Felipe, that for a distance of about one-half mile the road would cross to overlapping portions of the Pueblos mentioned; and that it was [word illegible] desirable to have an agreement with the San Felipe Pueblo for presentation to you at the same time as the agreement with the Santa Ana Pueblo. The superintendent now reports that the officials of the San Felipe Pueblo have refused to enter into any agreement concerning the opening of the road and that the highway authorities will be forced to resort to condemnation proceedings under the Act of May 10, [# illegible] (Public [word illegible]).

Under the circumstances it is thought that actions on the agreement with the Santa Ana Pueblo should not be further delayed, and provided the accompanying map of definite location is acceptable to the General Land Office, it is respectfully recommended that the agreement be approved under Section 17 of the Act of June 7, 1924 (43 Stat. L. 635-641) with the express reservations, however, of such rights as the Pueblo of San Felipe may have in and to the lands involved.

Respectfully,

9 PM 10

[name illegible]

OCT [# illegible], 1928 Assistant Commissioner

Approved:

[name illegible]

Assistant Secretary.

THIS AGREEMENT made and entered into this the 26th day of June A.D. 1926, [word illegible] between the Pueblo of Santa Ana, a Corporation, party of the first part, and the Board of County Commissioners of the County of Sandoval, and the State of New Mexico, party of the second part.

WITNESSETH: That whereas the party of the second part, by and with the corporation of the New Mexico State Highway Department and as a part of the work to be done under Federal Aid Project No. 88B proposes to construct and build a highway thru the said County of Sandoval, which said highway shall be a graded road constructed in accordance with the specifications and plans prepared in connection with the said Federal Aid Project No. 88B.

NOW, in consideration of the advantages which said road will be to the said party of the first part and to its prop-

erty, and in the further consideration of \$850.00 to be paid to the said party of the first part by the Board of County Commissioners of the County of Sandoval, State of New Mexico, within thirty days after the execution of this agreement by the party of the first part, and said party of the second part, the full and free right-of-way of the width of 80 feet, with necessary ground for cuts and fills for the highway referred to, also for the further consideration of three cents (0.03) per cubic yard for gravel. The basis of measurement and payment to be based on the Contractors Estimates, with the right of ingress and egress to and from such pits, upon and thru the lands of said Pueblo of Santa Ana described substantially as follows:

Being a line as surveyed and shown on the sketch map of Federal Aid Project 88B in Sandoval County, and also more particularly described as a right-of-way starting at a point approximately three and one tenth (3.1) miles North of the Town of Bernalillo, said point being Station 173+31.45 of Federal Aid Project 88B same being the South Boundry of the Santa Ana Pueblo.

Thence in a North Easternly direction thru Section 21, and Portions of Section 16, 15, and 10, to the North Boundry of the El Ranchito Land Grant, same being Station 313+54.35 of the Federal Aid Project No. 88B, same being considered North Boundry of the Santa Ana Pueblo.

IT BEING FURTHER UNDERSTOOD AND AGREED THAT the said party of the first part waives any claim for damages by reason of the construction of the highway in question and covenants and agrees that this easement or right-of-way shall be a permanent one so long as the said highway shall be maintained as a public road or highway, it being stipulated that in event said highway is ever abandoned as a public road or highway, this contract shall be forfeited and the easement herein granted waived and abandoned by the party of the second part of all the rights, privileges and interests herein granted.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seal the day and year in this agreement written above.

Elias Armijo
Captain

ATTEST

Sam P. Fulton

ATTEST

Glenn A. Towers

/s/ Hilario Sanchez, Governor
Santiago Tenorio,
Lieut. Gov.
Porfirio Montoya,
Interpreter
Board of County
Commissioner
Sandoval County

By J. M. Sandoval
Chairman

Walter Cockran
Special Attorney to Indians

Approved as to Form

STATE OF NEW MEXICO :
COUNTY OF SANDOVAL : ss

This 26th day of June A.D. 1926., before me personally appeared *Hilario Sanchez, Santiago Tenorio, Elias Armijo, Porfirio Montoya, & Daniel Otero* to me personally known to the same persons described in and who executed the foregoing instrument as a Committee of the Pueblo of Santa Ana appointed for the purpose, who being by me duly sworn, on their respective oaths do severally say, each for himself and no one for the other.

that he, the said Hilario Sanchez, is Governor;
that he, the said Santiago Tenorio, is Lieut. Governor

that he, the said Elias Armijo, is Captain of the
Santa Ana Council

that he, the said Porfirio Montoya, is Interpreter
Witness to mark.

that he, the said Daniel Otero, is representative
of the Santa Ana Council, and that the said instrument was signed in behalf of the Pueblo of Santa Ana by them, by authority, of the said community and they acknowledged the said instrument to be the free act and deed of the said Pueblo of Santa Ana, and that they executed the same as their free act and deed and as the deed of such committee and officers.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Clarence Higgins
My commission expires Dec. 16, 1928

Principals Representative
Daniel Otero

I hereby certify that the above and foregoing is a true and correct copy of the original agreement as filed in this office.

[name illegible]
Asst. District Engineer

ATTEST [name illegible]
Department of the Interior
Washington, D.C. OCT 13 1926

APPROVED:

[name illegible]

Assistant Secretary

DEFENDANT'S EXHIBIT 7

DEPARTMENT OF THE INTERIOR,
NOVEMBER 3, 1928.

Approved, pursuant to the provisions of Section 17 of
the Act of June 7, 1924 (43 Stat. L., 636):

/s/ John H. Edwards
Assistant Secretary.

EASEMENT FOR ELECTRIC POWER LINE
RIGHT-OF-WAY

This Indenture, made this 17th day of August, 1928, by and between the PUEBLO DE SANTA ANA, a corporation, existing under and by virtue of the laws of the State of New Mexico, party of the first part, and the NEW MEXICO POWER COMPANY, a corporation of the State of New Jersey duly authorized to do business in the State of New Mexico, party of the second part,

WITNESSETH:

That WHEREAS, the New Mexico Power Company, a corporation, has made an application to the duly qualified and elected Governor of the Pueblo de Santa Ana, party of the first part, for a right-of-way in the nature of an easement for an electric transmission and power line crossing the lands of the party of the first part; and

WHEREAS, the Governor has regularly called a meeting of the Council and other residents and inhabitants of the said Pueblo for the purpose of considering said application; and

WHEREAS, after due consideration of the said application the Governor and Council were authorized and directed to enter into a contract with the said New Mexico Power Company, a corporation, the party of the second part herein, granting a right-of-way in the nature of an easement for said transmission and power line across the lands of said Pueblo;

NOW, THEREFORE, for and in consideration of the sum of \$70.00 and other valuable considerations in hand paid to the party of the first part by the party of the second part, the receipt of which is hereby acknowledged, said party of the first part hereby grants, bargains, sells, and conveys to the party of the second part, its successors and assigns, for the period of fifty (50) years, a right-of-way and easement twenty feet (20') in width, on each side of the center line of such line with the right, privilege and authority to the said party of the second part, its successors, assigns, lessees and tenants to construct, erect, operate and maintain a line, or lines, for the purpose of transmitting and distributing electric or other power in, on, along, over, through, across or under the following described lands situate in Sandoval County, State of New Mexico, to-wit:

Beginning at station 0 plus 00, as shown on the accompanying map designated as exhibit "A" in application to Secretary of the Interior, a point on the east boundary line of El Ranchito Grant, in Section 21, Township 13 North, Range 4 East, New Mexico Principal Meridian, from which beginning point the four mile corner on said Grant line bears S.89°58', W., 462.8 feet distant, and running thence from said point of beginning N.35°03' E., 10,805 feet to station 108 plus 05.0, a point on the old South boundary line of the San Felipe Pueblo Grant, whence the five and one-half mile corner on said last named Grant line

bears S.86°58'E., 1675 feet distant; thence continuing N.35°03'E., 2602.6 feet to station 134 plus 07.6; thence N.41°03'E., 500 feet to station 139 plus 07.6; thence N.50°45'E., 254.4 feet to station 141 plus 62.0, a point on the northerly boundary line of said El Ranchito Grant, whence the two mile corner on said last named Grant line bears S.89°25' W., 165.5 feet distant; the herein described line traversing portions of Sections 21, 22, 15, 10 and 11, of said Township 13 North, Range 4 East, and being 21, 22, 15, 10 and 11, of said Township 13 North, Range 4 East, and being 2.682 miles in length, all in Sandoval County, State of New Mexico.

The instrument used on this survey is a W. & L.E. Gurley Transit No. 221471, with 8½ inch telescope and 6-inch vernier plates graduated to 1 minute of arc. Courses were determined by solar observations. Distances were measured with a Chicago 100-foot steel tape, and plumb-bobs were used in leveling for measurement where necessary.

Meridian determined from the established meridian of the City of Albuquerque.

Together with the right to said party of the second part, its successors and assigns, to place, erect, maintain, inspect, add to the number of and relocate at will, poles, towers, cross-arms, or fixtures, and string wires and cables, adding thereto from time to time, across, through, or over, the above described premises; to cut and remove from said premises or the premises of the party of the first part adjoining the same on either side any trees, overhanging branches or other obstructions which may endanger the safety or interfere with the use of said poles and towers or fixtures or wires attached thereto, or any structures on said premises; and the right of ingress and egress to and over the above described premises and any of the adjoining lands of the party of the first part at any and all times for the purposes of patrolling the line or re-

pairing or renewing or adding to the number of said poles, towers, structures, fixtures and wires, and for doing anything necessary or useful or convenient for the enjoyment of the easement herein granted; also the privilege of removing at any time any or all of said improvements erected upon, over, under or on said lands.

Together with the rights, easements, privileges and appurtenances in or to said lands which may be required for the full enjoyment of the rights herein granted.

It is understood and agreed that this easement shall not interfere with the use and occupation by first party for grazing or other usual purposes of the land covered by said right-of-way so long as such use and occupation does not interfere with the free use and enjoyment of said easement by second party.

IN WITNESS WHEREOF, we have hereunto set our hands the day and year first above written.

WITNESSES:

/s/ (Illegible)

/s/ (Illegible)

PUEBLO DE SANTA ANA

By /s/ Emiliano Otero
Governor

/s/ Jose Rye Leon
Lieutenant Governor

/s/ (Name Illegible)

/s/ Lem A. Towers

/s/ (Name Illegible)

/s/ Lem A. Towers

/s/ Crusio Loretto
His Mark (fingerprint)
/s/ San Lorenzo Tenorio
/s/ Daniel Otero
/s/ Porfirio Montoya
/s/ Estaven Huyia
His Mark (fingerprint)

STATE OF NEW MEXICO
COUNTY OF SANDOVAL ss.

On this 17th day of August, 1928, before me personally appeared Emiliano Otero, the Governor, and Jose Rey Leon, the Lieutenant Governor, and Crusio Loretto, San Lorenzo Tenorio, Daniel Otero, Porfirio Montoya, and Estaven Lujan, members of the Pueblo Council of the Pueblo de Santa Ana, a corporation, each to me personally known, who being by me duly sworn, did say that he is the officer designated as such in the foregoing instrument, and that said instrument was signed on behalf of said corporation by authority of a majority of the members attending a meeting called for the purpose of authorizing the execution of said instrument, and said Emiliano Otero, Governor, and Jose Rey Leon, Lieutenant Governor, and the members of said council whose names are affixed to the foregoing instrument, each for himself and not one for the other, acknowledged said instrument to be the free act and deed of said corporation; that the corporation does not have a corporate seal, and for that reason none is affixed hereto.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal the day and year last above written.

Jas. Russell Guild
Notary Public

My commission expires April 7, 1930

CERTIFICATE OF APPROVAL

I, Lemuel A. Towers, Superintendent in Charge of the Southern Pueblos in the State of New Mexico, hereby certify that:

1. The Pueblo de Santa Ana is one of the Indian Pueblos under my jurisdiction.
2. That I was present at the signing of the foregoing grant of easement for a right-of-way for electric transmission and distribution lines to the New Mexico Power Company.
3. That the said grant of easement was made with my full knowledge and consent.
4. That I hereby recommend the approval of the application of the New Mexico Power Company by the Honorable Secretary of the Interior for this grant of easement.

Lemuel A. Towers
Superintendent in Charge of
Southern Pueblos.

DEFENDANT'S EXHIBIT 8

BUREAU OF INDIAN AFFAIRS

RECEIVED

JAN 27 1958

996

WASHINGTON, D.C.

AGREEMENT

THIS AGREEMENT is made and entered into this 4 day of November, 1957, by and between the PUEBLO OF SANTA ANA, a community of Pueblo Indians residing in New Mexico, hereinafter called the Pueblo, and the UNITED STATES OF AMERICA through the Bureau of Reclamation, Department of the Interior, hereinafter called the United States.

Recitals.

A. The United States has made application for a right of way across tribal lands of the Pueblo of Santa Ana for construction of the Atrisco Feeder Canal North Reach extension, as indicated on attached drawing No. 163-518-3875, entitled "Atrisco Feeder Canal in the El Ranchito Grant", and construct a maintenance road along the Albuquerque Main Canal as indicated on attached drawing No. 163-518-3876 entitled "Albuquerque Main Canal in the El Ranchito Grant", said construction to be part of the irrigation rehabilitation which the Bureau of Reclamation is constructing.

B. At a meeting August 27, 1957, the Council of the Pueblo of Santa Ana consented to the grant of said right of way for the construction of the aforesaid rehabilitation across tribal lands of the Pueblo of Santa Ana.

C. The Council of the Pueblo of Santa Ana authorized the grant of said right of way across said lands subject to the payment of damages in the total amount of \$1,867.00.

NOW, THEREFORE, for and in consideration of the sum of \$1,867.00 for the right of way hereby granted across

tribal lands, including community and individually assigned lands, of the Pueblo of Santa Ana, which sum has been deposited by the Bureau of Reclamation with the United Pueblos Agency, Bureau of Indian Affairs, and which sum is determined and agreed is just compensation, it is agreed between the parties as follows:

1. The Pueblo hereby grants the United States and its assigns a right of way easement for the construction of the Atrisco Feeder Canal North Reach Extension and maintenance road along the Albuquerque Main Canal as shown on Drawing No. 163-518-3875 and Drawing No. 163-418-3876 for so long as said land shall be used by the United States or its assigns for construction of the aforesaid rehabilitation. When said land shall cease to be used for said purposes, the right of way easement hereby granted forthwith terminates. The members of the Pueblo of Santa Ana shall have the right to continue to use all gates and roads which are now or may in the future be in existence on the land covered by this grant of right of way. It is understood that the right to use the roads will not in any way interfere with the Bureau of Reclamation or its successors or assigns.

2. If, at any time, existing spoil banks along the Albuquerque Main Canal are drifting onto adjacent Indian lands, the United States, its successors and assigns, shall take appropriate measures to eliminate that condition. When danger of such a condition exists, the United States, its successors and assigns will not deposit additional excavated material upon said spoil banks. The determination of whether such material is drifting upon the Indian lands, or whether a danger thereof exists, shall

be made by the Secretary of the Interior, whose decision thereon shall be final.

3. Nothing in this grant of right of way shall in any way be construed to abrogate or impair existing obligations of the Middle Rio Grande Conservancy District, including obligations to furnish water for the use of the Pueblo of Santa Ana, its members and their lands whether based on treaty, agreement, Act of Congress or general law.

4. Nothing in this grant of right of way shall be construed to affect adversely the rights of the Pueblo of Santa Ana or its members or its or their lands under existing contracts between the United States and the Middle Rio Grande Conservancy District or any other such contracts or under existing laws of the United States relating to said rights.

5. The priority of right and the quantity of water to which the Pueblo of Santa Ana, its members and its and their land are entitled shall not be adversely affected and are saved to and protected for the Pueblo, its members and their lands.

6. The United States expressly agrees to all of the stipulations provided for in the rules and regulations of the Department of the Interior relating to rights of way, especially those set forth in 25 C.F.R. 256.7 (now 161.7).

7. This agreement shall not be effective until approved by the Secretary of the Interior, pursuant to Sec. 17 of the Act of June 7, 1924, 43 Stat. 636.

IN WITNESS WHEREOF we have hereunto set our hands the day and year first above written.

Approved as to form [*word illegible*], 1959

PUEBLO OF SANTA ANA

By Jose Bob Pino
Governor

[*name illegible*]
Field Solicitor

Recommended for approval:

BUREAU OF RECLAMATION

By [*name illegible*]

Title [*word illegible*] Manager

[*name illegible*]
General Superintendent
United Pueblos Agency
Bureau of Indian Affairs

Approved: _____, 195_____

[*name illegible*]
Secretary of the Interior

BUREAU OF INDIAN AFFAIRS
RECEIVED JAN. 27 1958
996
WASHINGTON, D.C.

RESOLUTION

At a duly called meeting of the Council of the PUEBLO OF SANTA ANA on the 27th day of August, 1957, the following resolution was adopted:

Recitals.

(a) The Bureau of Reclamation, Department of the Interior, is rehabilitating the works and structures of the Middle Rio Grande Conservancy District including the Atrisco Feeder Canal North Reach Extension in Sections 10, 15, 16, and 17, and the Albuquerque Main Canal in Sections 10, 15, and 16, all in Township 13 North, Range 4 East within Santa Ana Pueblo Grant.

(b) The Bureau of Reclamation has applied for additional right of way on Santa Ana Pueblo land for the Atrisco Feeder Canal North Reach Extension and the Albuquerque Main Canal at the locations and in the varying widths as shown on Maps No. 163-518-3875 and No. 163-518-3876 prepared by that Bureau and entitled "Atrisco Feeder Canal in the El Ranchito Grant" and "Albuquerque Main Canal in the El Ranchito Grant."

NOW, THEREFORE, BE IT RESOLVED that the Pueblo of Santa Ana hereby consents to the grant of right of way to the United States and its assigns at the location shown on above-mentioned maps No. 163-518-3875 and No. 163-518-3876 for the Atrisco Feeder Canal North Reach Extension and Albuquerque Main Canal for so long as said land shall be used by the United States or its assigns for irrigation and drainage purposes. When said land shall cease to be used for said purpose, the right of way easement hereby granted shall forthwith terminate.

BE IT FURTHER RESOLVED that said right of way is granted subject to the following terms and conditions:

(1) Payment of damages shall be made as follows:

ATRISCO FEEDER CANAL (North Reach Extension)		
	Acreage	Amount
Community Tribal Lands	25.12	Donation
Assignee	Additional Acreage	Amount
Longino Otero	0.22	\$ 44.00
Jose Bob Pino	0.27	54.00
Abel Lujan	0.29	58.00
Petronilo Montoya	0.09	18.00
Tom Cristobal (Benito Garcia)	0.48	96.00
(Cristo) Raton, sons, Enrique Albert	0.56	112.00
Abel Lujan	0.62	124.00
Emilio Raton	0.36	72.00
Santa Ana Community Lands	0.46	92.00
	3.35	670.00
Grand Total	28.47	\$ 670.00

ALBUQUERQUE MAIN CANAL		
Assignee	Acreage	Amount
Raymond Montoya	0.21	\$ 63.00
Jesus Manuel and Christo Garcia (Lt. Gov.)	0.35	105.00
Fabian Lopez	0.74	222.00
Fidel Lopez	0.24	72.00
Gabriel Montoya	0.56	168.00
Joe Garcia	0.25	75.00
Santiago Barela	0.22	66.00
Domingo Montoya	0.33	99.00
Joe Paguin	0.26	78.00
Jack Sanchez	0.17	51.00
/s/ JBP Jose Rey Leon	0.11	33.00
Miguel Armigo	0.18	54.00
San Lorenzo Tenorio	0.09	27.00
Porfirio Montoya	0.03	9.00

Santiago Tenorio	0.03	9.00
Lolito Pena Cristobal	0.22	66.00
Community Tribal Lands	0.00	00.00
	<u>3.99</u>	<u>\$1,197.00</u>

(2) The United States shall have the right to construct and maintain access roads along the full lengths of the right of way in order to facilitate operation and maintenance of the Atrisco Feeder Canal North Reach Extension and Albuquerque Main Canal, provided that the right is reserved in the Pueblo of Santa Ana to use the operation and maintenance road to be constructed along the east side of the Albuquerque Main Canal between the north boundary of the El Ranchito Grant and Station 115+00. It is understood that the right to use the road will not in any way interfere with the operations of the Bureau of Reclamation or its successors or assigns.

(3) Nothing in this grant of right of way shall in any way be construed to abrogate or impair existing obligations of the Middle Rio Grande Conservancy District or the Bureau of Reclamation, including obligations to furnish water for the use of the Pueblo of Santa Ana, its members and their lands whether based on treaty, agreement, Act of Congress or general law.

(4) Nothing in this grant of right of way shall be construed to affect adversely the rights of the Pueblo of Santa Ana or its members or its or their lands under existing contracts between the United States and the Middle Rio Grande Conservancy District or any other such contracts or under existing laws of the United States relating to said rights.

(5) The priority of right and the quantity of water to which the Pueblo of Santa Ana, its members and its and their land are entitled shall not be adversely affected and are saved to and protected for the Pueblo, its members and its and their lands.

(6) The United States expressly agrees to all of the stipulations provided for in the rules and regulations of the Department of the Interior relating to right of way, especially those set forth in 25 C.F.R. 256.7. (/s/ now 161.7)

(7) In view of the fact that regulations of the Department of the Interior governing right of way (25 C.F.R. 256.19—/s/ 161.10) provide that the Superintendent may approve a right of way for this purpose for not to extend 50 years, it is desired by the Pueblo of Santa Ana that the hereinabove mentioned right of way be approved, in perpetuity, by the Secretary of the Interior under provisions of the Pueblo Lands Act, approved June 7, 1924, 43 Stat. 636.

BE IT FURTHER RESOLVED that in connection with the approval of the grant of right of way by the Secretary of the Interior, authority be requested for him to authorize the General Superintendent of United Pueblos Agency to disburse direct to the Pueblo of Santa Ana funds deposited by the Bureau of Reclamation for said right of way and that said damages shall not be taken up in a Proceeds of Labor Account.

/s/ Jose Bob Pino
Governor

/s/ Fidel Lopez
Member of Council

/s/ Fabian Lopez
Member of Council

DEFENDANT'S EXHIBIT 9

BUREAU OF INDIAN AFFAIRS

Received AUG - 6 1956

11092

Washington, D. C.

A G R E E M E N T

THIS AGREEMENT is made and entered into this 15 day of June, 1956, by and between the PUEBLO OF SANTA ANA, a community of Pueblo Indians residing in New Mexico, hereinafter called the Pueblo, and the UNITED STATES OF AMERICA through the Bureau of Reclamation, Department of the Interior, hereinafter called the United States.

Recitals

A. The United States has made application for a right of way across tribal land of the Pueblo of Santa Ana for construction of the Atrisco feeder canal indicated on attached Drawing Number 163-518-2479, marked Exhibit "A", said feeder canal to be a part of the irrigation rehabilitation work which the Bureau of Reclamation is constructing.

B. At a meeting December 13, 1955, the Council of the Pueblo of Santa Ana consented to the grant of said right of way for the Atrisco feeder canal across tribal lands and across assigned land of one member of the Pueblo of Santa Ana.

C. The council of the Pueblo of Santa Ana authorized the grant of said right of way across tribal community land and assigned land in accordance with the following schedule of payment of damages:

1. To the Pueblo of Santa Ana for 3.97 acres of community land at the rate of \$50.00 per acre \$198.50
2. To Valencia Garcia, a member of the Pueblo of Santa Ana, for 0.25 acres of tribal land duly assigned to his use, at rate of \$300.00 per acre 75.00
The east 0.17 acres of this tract is to be used for road right of way by members of the Pueblo of Santa Ana.

TOTAL \$273.50

NOW, THEREFORE, for and in consideration of the sum of \$273.50 for the right of way hereby granted across 3.97 acres of tribal land and 0.25 acres of tribal land assigned to the use of one individual member of the Pueblo of Santa Ana, which sum has been deposited by the Bureau of Reclamation with the Albuquerque Office, Bureau of Indian Affairs, and which sum is determined and agreed is just compensation, it is agreed between the parties as follows:

1. The Pueblo hereby grants the United States and its assigns a right of way easement for the construction of the Atrisco feeder canal, the right of way 40 feet in width and 4,631.96 feet in length as shown on Drawing Number 163-518-2479, marked Exhibit "A" for so long as said land shall be used by the United States or its assigns for construction, operation and maintenance of the said Atrisco feeder canal. When said land shall cease to be used for said purposes, the right of way easement hereby granted shall forthwith terminate.

2. Nothing in this grant of right of way shall in any way be construed to abrogate or impair existing obligations

of the Middle Rio Grande Conservancy District, including obligations to furnish water for the use of the Pueblo of Santa Ana, its members and their lands whether based on treaty, agreement, Act of Congress or general law.

3. Nothing in this grant of right of way shall be construed to affect adversely the rights of the Pueblo of Santa Ana or its members or its or their lands under existing contracts between the United States and the Middle Rio Grande Conservancy District or any other such contracts or under existing laws of the United States relating to said rights.

4. The priority of right and the quantity of water to which the Pueblo of Santa Ana, its members and its and their land are entitled shall not be adversely affected and are saved to and protected for the Pueblo, its members and its and their lands.

5. The United States expressly agrees to all of the stipulations provided for in the rules and regulations of the Department of the Interior relating to rights of way, especially those set forth in 25 C.F.R. 256.7.

6. This agreement shall not be effective until approved by the Secretary of the Interior, pursuant to the Act of June 7, 1924, 43 Stat. 636.

IN WITNESS WHEREOF we have hereunto set our hands the day and year first above written.

Approved as to form: 6-13, 1956

PUEBLO OF SANTA ANA

By /s/ Jose Bobe Pino
Governor

/s/ William A. Brophy
Field Solicitor
Appd. Sol. Off.

Recommended for Approval:

BUREAU OF RECLAMATION

By /s/ John C. Thompson
Title *Project Manager*

[*name illegible*]
General Superintendent
United Pueblos Agency
Bureau of Indian Affairs

Approved: SEP 10 1956

[*name illegible*]
Assistant Secretary of the Interior

RESOLUTION

At a duly called meeting of the Council of the PUEBLO OF SANTA ANA on the 13th day of December, 1955, the following resolution was adopted:

Recitals.

(a) The Bureau of Reclamation, Department of the Interior is rehabilitating the works and structures of the Middle Rio Grande Conservancy District, including the Atrisco Feeder Canal with Sections 20 and 30 of Township 13 N., W. L. L., within Santa Ana Pueblo Grant.

(b) The Bureau of Reclamation has applied for additional rights of way on Santa Ana Pueblo land for the Atrisco Feeder Canal at the locations and in the varying widths as shown on Map No. 163-518-2479 prepared by that Bureau and entitled "Atrisco Feeder Canal, Irrigation Rehabilitation, Santa Ana Pueblo Grant Rights of Way."

NOW, THEREFORE, BE IT RESOLVED that the Pueblo of Santa Ana hereby consents to the grant of right

of way to the United States and its assigns at the locations shown on the above-mentioned map No. 163-518-2479 for the Atrisco Feeder Canal for so long as said land shall be used by the United States or its assigns for irrigation and drainage purposes. When said land shall cease to be used for said purpose, the right of way easement hereby granted shall forthwith terminate.

BE IT FURTHER RESOLVED that said right of way is granted subject to the following terms and conditions:

(1) Payment of damages shall be made as follows:

- (a) To the Pueblo of Santa Ana for 3.97 acres of community land at the rate of 50.00 per acres 198.50
- (b) To Valencia Garcia, a member of the Pueblo of Santa Ana, for .25 acre of tribal land duly assigned to his use, at rate of 300.00 per acre 75.00

Said payment to above-named member of the Pueblo of Santa Ana shall be made by separate check, in favor of said person, in the amount stipulated above opposite his name.

(2) The United States shall have the right to construct and maintain access roads along the full lengths of the right of way in order to facilitate operation and maintenance of the Atrisco Feeder Canal.

(3) Nothing in this grant of right of way shall in any way be construed to abrogate or impair existing obligations of the Middle Rio Grande Conservancy District or the Bureau of Reclamation, including obligations to furnish water for the use of the Pueblo of Santa Ana, its members and their lands whether based on treaty, agreement, Act of Congress or general law.

(4) Nothing in this grant of right of way shall be construed to affect adversely the rights of the Pueblo of Santa Ana or its members or its or their lands under existing contracts between the United States and the Middle Rio Grande Conservancy District or any other such contracts or under existing laws of the United States relating to said rights.

(5) The priority of right and the quantity of water to which the Pueblo of Santa Ana, its members and its and their land are entitled shall not be adversely affected and are saved to and protected for the Pueblo, its members and its and their lands.

(6) The United States expressly agrees to all of the stipulations provided for in the rules and regulations of the Department of the Interior relating to rights of way, especially those set forth in 25 C.F.R. 256.7.

(7) In view of the fact that regulations of the Department of the Interior governing rights of way (25 C.F.R. 256.19) provide that the superintendent may approve a right of way for this purpose for not to exceed fifty years, it is desired by the Pueblo of Santa Ana that the hereinabove mentioned right of way be approved, in perpetuity, by the Secretary of the Interior under provisions of the Pueblo Lands Act, approved June 7, 1924, 43 Stat. 636.

BE IT FURTHER RESOLVED that in connection with the approval of the grant of right of way by the Secretary of the Interior, authority be requested for him to authorize the General Superintendent of United Pueblo Agency to disburse direct to the Pueblo of Santa Ana and to the individual member named herein his respective

share of the damages deposited by the Bureau of Reclamation for said right of way and that said damages shall not be taken up in a Proceeds of Labor Account.

/s/ Fidelino Sanchez
Governor

/s/ Joe Garcia
Member of Council

(signed William A. Brophy 6/13/56

Appd. Sol. Off.

/s/ Porfirio Montoya
Member of Council

DEFENDANT'S EXHIBIT 10

(This was a copy of Right of Way Agreement between the Pueblo of Santa Ana and Mountain Bell, dated February 23, 1928. This material can be found at J.A. 38-43.)

DEFENDANT'S EXHIBIT 11

DEPARTMENT OF THE INTERIOR UNITED STATES INDIAN FIELD SERVICE

Southern Pueblos Agency, Box 563,
Albuquerque, New Mexico.
March 29, 1928.

April 6, 1928
17497

The Commissioner of Indian Affairs,
Washington, D. C.

Sir:

I am submitting herewith five copies of a right-of-way agreement made between the Mountain States Telephone & Telegraph Company and the Santa Ana pueblo for a right-of-way across the El Ranchito Grant. The tracings will be sent under separate cover.

I was present at a meeting between the Indians and the representative of the Telephone Company wherein an agreement was reached to pay to the pueblo \$101.60 for this right-of-way. We believe this to be a fair price and it is a little higher than the price paid by this company to some of the other pueblos, but this was done for the reason that the Indians disputed the south boundary of their Grant as defined by the Pueblo Lands Board and rather than discuss this matter the company paid what the Indians asked as a total, which was the equivalent of 80¢ a pole for 127 poles. We, therefore, recommend that this agreement be approved, and upon its approval we request authority to pay this money to the Governor of the pueblo.

Respectfully yours,

/s/ Lem A. Towers
Superintendent.

LAT:AD

DEFENDANT'S EXHIBIT 12

153722
5-1100

Address Only the
Commissioner of Indian Affairs

Refer in Reply to the
Following

L-C
17497-28

UNITED STATES
DEPARTMENT OF THE INTERIOR

Office of Indian Affairs
Washington

The Honorable

The Secretary of the Interior.

Sir:

There is transmitted herewith letter dated March 29, 1928, from the Superintendent of the Southern Pueblos Agency, transmitting five parts of agreement dated February 23, 1928, between the pueblo of Santa Ana and the Mountain States Telephone & Telegraph Company whereby the pueblo-named grants a right-of-way for telephone and telegraph line across the El Ranchito Grant for consideration of \$101.60.

The Superintendent reports that this amount, which is at the rate of 80¢ a pole for 127 poles, has been deposited with him and is regarded as being a fair price. He recommends that the agreement be approved and authority granted for him to turn the consideration over to the Governor of the Santa Ana pueblo for the benefit of the Indians thereof.

In view of the facts presented it is recommended that the agreement herewith be approved pursuant to the provisions of Section 17 of the Act of June 7, 1924 (43 Stat. L. 636); and that authority be granted for the Superintendent of the Southern Pueblos Agency to turn over the consideration amounting to \$101.60 to the Governor of the Santa Ana pueblo for the benefit of the Indians thereof.

Respectfully,

/s/ E. B. Merritt
Assistant Commissioner.

Approved: APR 13 1928

/s/ John H. Edwards
Assistant Secretary.

DEFENDANT'S EXHIBIT 13

Re-Right of way - El Ranchito Grant, Pueblo de Santa Ana,
New Mexico

THE MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY

Arizona Colorado Idaho Montana New Mexico
Utah Wyoming El Paso, Texas
800 Fourteenth Street

F. A. Cannon,

Superintendent of Rights of Way

Denver, Colo. March 27, 1928.

Mr. Lem. A. Towers, Superintendent Southern Pueblos,
United States Indian Field Service,
Albuquerque, New Mexico.

Dear Sir:

Enclosed find formal application of The Mountain States Telephone and Telegraph Company for right of way for its telephone and telegraph line across the El Ranchito Grant, Pueblo de Santa Ana, New Mexico.

In addition to the formal application, the required affidavits, and certificates, the field notes in duplicate, five copies of agreement dated February 23, 1928, between the

Pueblo de Santa Ana and this Company, together with two photostatic copies of the voucher, and official receipt § 586687 covering the amount \$101.60 paid to the Pueblo, are also inclosed. The tracing, in duplicate, showing the location of the line is being sent by express together with one blue print which may be retained in your file.

We would thank you to advise if anything has been omitted or if any error is found in this application in order that we may take corrections.

Will you kindly advise when this application is approved?

Yours truly,

/s/ F. A. CANNON

Superintendent of Rights of Way.

TO THE SECRETARY OF THE INTERIOR,

Washington, D. C.

Dear Sir:

Application for the Approval of
Grant of a Right of Way for a
Telephone and Telegraph Line
Across El Ranchito Grant, a
Part of the Pueblo de Santa Ana,
New Mexico.

The Mountain States Telephone and Telegraph Company, a corporation duly organized and existing under the laws of the State of Colorado, and duly authorized to transact business in the State of New Mexico, hereby makes application for the approval of the Honorable Secretary of

the Interior of a deed or grant executed on behalf of the Pueblo de Santa Ana, by its duly authorized officers, for a right of way in the nature of an easement for the construction, operation and maintenance of a telephone and telegraph line across El Ranchito Grant, a part of the Pueblo de Santa Ana, the title to which is vested in the Pueblo de Santa Ana. The location of the line is as follows:

Beginning at a point on the south boundary of El Ranchito Grant, Section Twenty-one (21), Township Thirteen (13) North, Range Four (4) East, from which point the three and one-half mile corner bears north $89^{\circ} 58'$ east 1389.5 feet; thence in a general northeasterly direction across El Ranchito Grant to the north boundary of said grant, from which point the northeast corner of El Ranchito Grant bears south $89^{\circ} 00'$ east 2773.1 feet, a total distance of 2.988 miles.

Said right of way is more particularly described in the map and field notes hereto attached.

This application is made pursuant to the provisions of the Act of June 7, 1924.

The following documents are attached hereto, and made a part of this application:

Exhibit A — Map showing the line of route of the said right of way, inscribed upon which is an affidavit of Mr. F. A. Cannon, Superintendent of Rights of Way, to the effect that the survey of said right of way was made under his direction, and is accurately represented on said map; that there is also inscribed upon said map a statement by the company's Vice President and attested by the Secretary under the company's seal, showing the authority of the said Superintendent of Rights of Way to

make the survey, and certifying also to the accuracy of said map, and the purposes thereof.

Exhibit B—Copy of the field notes and survey upon which the said map is based.

Exhibit D—Form of agreement executed by the proper officials of the Pueblo de Santa Ana and The Mountain States Telephone and Telegraph Company, on the 23rd day of February, 1928.

Exhibit E—Affidavit of applicant's Vice President, under the seal of the company, showing the names and designations of its officers at this date.

Exhibit F—Certified copy of a Resolution of the Board of Directors authorizing the Vice President of said company to execute, on behalf of the said company, exhibits of the kind herein referred to.

Exhibit G—Certificate by the Vice President of said company to the effect that the organization of said company has been completed, and that the said company is fully authorized to proceed with the construction and maintenance of the said telephone and telegraph line above referred to, and that a copy of the articles of incorporation of said company has heretofore been filed with the Department of the Interior, and that no changes have been made therein since said filing.

The Mountain States Telephone and Telegraph Company further states that copies of its articles of incorporation have heretofore been forwarded to your department, as have also certificates of the Corporation Commission of the State of New Mexico, showing that the appli-

cant has complied with all the laws of that state relating to or governing foreign corporations.

The Mountain States Telephone and Telegraph Company further states that it intends in good faith to construct, maintain and operate a telephone and telegraph line along the right of way, approval of which is herein applied for, and respectfully requests that the said right of way or easement be approved in accordance with the Act above referred to.

Dated at Denver, Colorado, this 23rd day of March, 1928.

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

By H. E. McAfee
Its Vice President.

DEFENDANT'S EXHIBITS 14-19 omitted in printing.

UNITED STATES DEPARTMENT
OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS

Southern Pueblos Agency

P.O. Box 1667

1000 Indian School Road, N.W.
Albuquerque, New Mexico 87103

Received By Nov. 4, 1981

Mountain Bell Law Department

In Reply Refer To:
Real Property Management

October 30, 1981

Mr. Stuart S. Gunckel
 Mountain States Telephone & Telegraph Company
 931 - 14th Street, Suite 1300
 Denver, Colorado 80202

*Pueblo of Santa Ana v.
 Mountain States Telephone
 and Telegraph Company,
 CIV No. 80 841 M*

Dear Mr. Gunckel:

On July 15, 1981 you took a deposition from Mrs. Louisa B. Sando, Realty Specialist at Southern Pueblos Agency, concerning Real Property Management file information relating to approval of rights-of-way under section 17 of the Pueblo Lands Act of June 7, 1924 (43 Stat. L. 636). On rechecking the files Mrs. Sando has found some corrections are necessary to that deposition.

The earliest approval under section 17 of the Act of June 7, 1924 was given as October 1924. A review of the files indicates two approvals listed as October 1924 were under the Act of March 3, 1911 (36 Stat. 1253). These two rights-of-way were *reapproved in July 1928* under the Act of June 7, 1924.

The file records indicate the earliest approval of a right-of-way under section 17 of the Act of June 7, 1924 was made April 28, 1926 for railroad right-of-way.

One right-of-way to the AT&SF Railway Company for a coaling station was included in the count of rights-of-way approved under the Act of June 7, 1924. We find now this was approved in 1923 under a different act.

In addition to a power line right-of-way to Albuquerque Gas and Electric Company for a 44 KV line across Sandia Pueblo land approved April 5, 1926, we find there were two subsequent line changes on that right-of-way approved under the Act of June 7, 1924. Approval dates were February 7, 1931 and September 29, 1933.

Sincerely,

/s/ Omar Bradley
 Agency Realty Officer

NOTION FILED
NOV 21 1984

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No. 84-262

In the Supreme Court of the United States

October Term, 1984

— o —

THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,
Petitioner,

v.

PUEBLO OF SANTA ANA,
Respondent.

— o —

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

— o —

MOTION OF PUBLIC SERVICE COMPANY OF
NEW MEXICO FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF AMICUS CURIAE
IN SUPPORT OF THE POSITION
OF THE PETITIONER

— o —

ROBERT H. CLARK
Counsel of Record

CLYDE F. WORTHEN
PAULA Z. HANSON
KELEHER & MCLEOD, P.A.
P.O. Drawer AA
414 Silver Avenue S.W.
Albuquerque, New Mexico 87103
(505) 842-6262

Counsel for *Amicus Curiae*,
Public Service Company of
New Mexico

51

In the Supreme Court of the United States

October Term, 1984

— o —
**THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,**
Petitioner,

v.

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— o —

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— o —

**MOTION OF PUBLIC SERVICE COMPANY OF
NEW MEXICO FOR LEAVE TO FILE BRIEF
AMICUS CURIAE IN SUPPORT OF
THE POSITION OF THE PETITIONER**
— o —

Public Service Company of New Mexico ("PNM") hereby respectfully moves the Court for leave to file the attached brief *amicus curiae* in the above-entitled cause. The consent of the attorney for Petitioner, Mountain States Telephone and Telegraph Company, has been obtained. The consent of the attorney for the Respondent, Pueblo of Santa Ana, was requested but refused.

PNM has a substantial interest in this case, which is more fully set forth in the attached brief in support of the Petitioner's position, because:

1. PNM is engaged in the generation, distribution, purchase and sale of electricity in New Mexico, and utilizes almost 9,000 miles of electric lines in New Mexico;

2. PNM's electric lines necessarily must, and in fact do, cross the lands of numerous New Mexico Indian Pueblos;

3. At least five Pueblos, including the Respondent Pueblo of Santa Ana, granted PNM rights-of-way across their lands during the period from 1928 to 1936. These rights-of-way were approved by the Secretary of the Interior pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636; the interpretation of which is at issue in the instant case;

4. PNM, like the Petitioner, was unaware of any contention that its rights-of-way might be invalid until the district court entered its decision in this cause. Since the entry of that decision, PNM has been sued by the Pueblo of Isleta (United States District Court for the District of New Mexico, No. CIV-82-1535 C) and the United States on behalf of the Pueblos of Isleta, Sandia, San Felipe, Santa Ana and Santo Domingo (United States District Court for the District of New Mexico, No. CIV-82-1483 BB). In both cases, the Plaintiffs assert that the district court's decision in the present case provides a basis for ejectment and for the recovery of trespass damages against PNM. The decision in the captioned-cause may be determinative of the litigation pending against PNM;

5. If the decision below stands, PNM's ability to provide electric service to its customers, including a substantial number of Pueblo residents and businesses, may be significantly impaired in that uninterrupted service is dependent on the utilization of lines crossing Pueblo lands;

6. PNM also operates the municipal water system for the City and County of Santa Fe. As a consequence of these business activities, PNM is a party to a general water rights adjudication suit currently pending in federal court. (*State of New Mexico ex rel. S. E. Reynolds v. Aamodt*, United States District Court, District of New Mexico, No. CIV 6639-M.) In that suit, four New Mexico Pueblos have challenged the validity of the water rights of PNM and more than one thousand other non-Indians who own land within the Pueblo's boundaries. In dicta in the instant case, the Tenth Circuit discussed the date the Indian Non-Intercourse Act first applied to Pueblo lands. While irrelevant to a resolution of the issues here, such a determination is directly relevant to the issues in *Aamodt* and may have a direct impact on the validity of PNM's water rights at issue in *Aamodt*;

7. The issues raised in this cause and discussed in the attached *amicus* brief may have a direct and immediate impact on PNM and its customers; and

8. PNM was previously granted leave to file an *amicus* brief in support of the Petition for Writ of Certiorari based on the same interest as set forth in this motion and the attached brief.

For the reasons set forth herein and in PNM's brief in support of the Petitioner's position, PNM respectfully

requests that its Motion for Leave to file the accompanying *amicus* brief be granted.

Respectfully submitted,

ROBERT H. CLARK
Counsel of Record

CLYDE F. WORTHEN
PAULA Z. HANSON
KELEHER & McLEOD, P.A.
P.O. Drawer AA
Albuquerque, New Mexico 87103
(505) 842-6262

Counsel for *Amicus Curiae*,
Public Service Company of
New Mexico

No. 84-262

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BRIEF AMICUS CURIAE OF PUBLIC SERVICE
COMPANY OF NEW MEXICO IN SUPPORT OF
THE POSITION OF THE PETITIONER
— o —

QUESTIONS PRESENTED

1. Did Congress intend Section 17 of the Pueblo Lands Act of June 7, 1924, to authorize the New Mexico Pueblos, with the approval of the Secretary of the Interior, to voluntarily grant rights-of-way for their own benefit and did the Tenth Circuit therefore err in holding that rights-of-way granted pursuant to Section 17 are void?
2. Did the Tenth Circuit err in refusing to give deference to the construction given Section 17 of the Pueblo Lands Act by the Department of the Interior?

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINION BELOW AND JURISDICTION	1
STATUTES INVOLVED	1
INTEREST OF <i>AMICUS CURIAE</i>	2
SUMMARY OF ARGUMENT	9
ARGUMENT:	
I. Congress Intended Section 17 to Empower the Pueblos to Voluntarily Grant Rights-of-Way with Secretarial Approval; Therefore, the Tenth Circuit Erred in Holding that the Conveyance at Issue is Void.	10
II. The Tenth Circuit Erred in Failing to Give Proper Deference to the Department of the Interior's Contemporaneous Construction of Section 17.	19
CONCLUSION	21
APPENDICES:	
A—Map of North-central New Mexico	App. 1
B—Pueblo Lands Act	App. 2
C—Indian Non-Intercourse Act	App. 7
D—Francis Wilson Letter to Commissioner	App. 8
E—George Fraser Letter to Attorney General	App. 10
F—Francis Wilson Letter to Interior Secretary	App. 16
PROOF OF SERVICE	

TABLE OF AUTHORITIES

Pages

CASES:

<i>Alabama Ass'n. of Insurance Agents v. Bd. of Governors of the Federal Reserve System</i> , 533 F.2d 224 (8th Cir. 1976)	20
<i>Chemehuevi Tribe of Indians v. F.P.C.</i> , 420 U.S. 395 (1975)	20
<i>Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna and United States</i> , 542 F.2d 1375 (10th Cir. 1976)	16
<i>Pueblo Santa Ana v. Mountain Telephone and Telegraph Co.</i> , 734 F.2d 1402 (10th Cir. 1984)	3, 4
<i>Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers</i> , 367 U.S. 396 (1961)	20, 21
<i>Saxbe v. Bustos</i> , 419 U.S. 65 (1974)	20
<i>Udall v. Tallman</i> , 380 U.S. 1 (1965)	21
<i>United States v. Candelaria</i> , 271 U.S. 432 (1926)	11, 14
<i>United States v. Jackson</i> , 280 U.S. 183 (1929)	20
<i>United States v. Joseph</i> , 94 U.S. 614 (1877)	10, 11
<i>United States v. Midwest Oil Company</i> , 236 U.S. 459 (1915)	20
<i>United States v. Sandoval</i> , 231 U.S. 28 (1913)	11
<i>United States v. Vogel Fertilizer Co.</i> , 455 U.S. 16 (1982)	21

FEDERAL STATUTES AND REGULATIONS:

Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177	passim
Act of March 2, 1899, 30 Stat. 992, 25 U.S.C. § 315	14
Act of March 3, 1901, 31 Stat. 1083, 25 U.S.C. § 319	14

TABLE OF AUTHORITIES—Continued

Pages

Act of May 10, 1926, 44 Stat. 498	15, 17, 20
Act of April 21, 1928, 45 Stat. 422, 25 U.S.C. § 322 (1982)	16, 17, 20
Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323-328	18
New Mexico Enabling Act of June 20, 1910, 36 Stat. 557	11
Pueblo Lands Act of June 7, 1924, 43 Stat. 636, amended by Act of May 31, 1933, 48 Stat. 108	passim
25 C.F.R. §§ 169.3(a) and 169.9 (1984)	5
LEGISLATIVE HISTORY:	
1923 Senate Hearings, 72-75, 154-155, 229	14
1923 House Hearings, 40-41	14
Hearings on S. 3865 and S. 4223 Before Subcomm. of Sen. Comm. on Public Lands and Surveys, 67th Cong., 4th Sess. 230-35 (1923)	11
House Report No. 94-800 to Committee on In- terior and Insular Affairs regarding S. 217 (1976) ..	15
OTHER AUTHORITIES:	
N.M. Stat. Ann. § 30-13-2 (1978)	8
N.M. Stat. Ann. §§ 62-8-1 and 62-8-2 (1978)	2
Strickland, et al., <i>Felix Cohen's Handbook of Federal Indian Law</i> (1982)	10
The Department of the Interior Annual Report (1981)	2

**BRIEF AMICUS CURIAE OF PUBLIC SERVICE
COMPANY OF NEW MEXICO**

The *amicus curiae*, Public Service Company of New Mexico ("PNM"), respectfully requests that this Court uphold the validity of limited term rights-of-way which have been both consented to by a Pueblo and approved by the Secretary of the Interior pursuant to Section 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 (hereinafter referred to as the "Act" or the "Pueblo Lands Act") and that the decision of the United States Court of Appeals for the Tenth Circuit be reversed.

OPINION BELOW AND JURISDICTION

The opinion of the Tenth Circuit and the grounds upon which the jurisdiction of this Court is invoked are described fully in the brief on the merits of Petitioner, Mountain States Telephone and Telegraph Company ("Mountain States"), filed November 23, 1984.

STATUTES INVOLVED

The following statutes are involved in this case:

Act of June 7, 1924, 43 Stat. 636;

Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177.

The complete text of both these statutes has been set forth in Mountain States' Petition for Certiorari and therefore only the pertinent portions of text are reproduced herein at Appendix B and Appendix C.

INTEREST OF THE AMICUS CURIAE

PNM is a public utility engaged in the generation, distribution, purchase and sale of electricity. PNM provides retail electric service to portions of north-central and southwestern New Mexico, including the cities of Albuquerque, Santa Fe, Las Vegas, Clayton, Bernalillo, Belen, and Deming. PNM also furnishes wholesale electric service to the New Mexico cities of Farmington and Gallup, to the United States Department of Energy at Los Alamos, New Mexico and to other electric companies. PNM utilizes nearly 9,000 miles of electric transmission, distribution and service lines within the State of New Mexico. This system of interconnected lines is designed to provide uninterrupted electric service to PNM's customers in an economical manner. Indeed, PNM has a statutory obligation to provide adequate, efficient and reasonable electric service at just and reasonable rates. N.M. Stat. Ann. §§ 62-8-1 and 62-8-2 (1978).

Eight of New Mexico's nineteen Indian Pueblos are located in PNM's service area and receive retail electric service from PNM.¹ It is virtually impossible for PNM to provide electric service to non-Indians without its lines crossing Pueblo lands. It is in fact impossible for PNM to provide electric service to the Pueblos without crossing their lands.

¹ See, Appendix A, Map of the area between Belen and Santa Fe, New Mexico. The nineteen Pueblos in New Mexico together own almost 2,100,000 acres of land. Of this, Santa Ana owns approximately 62,000 acres and the Pueblos of Santo Domingo, San Felipe, Isleta and Sandia together own approximately 352,000 acres. The Department of the Interior Annual Report (1981).

PNM also operates the municipal water system for the City and County of Santa Fe. As part of the operation of this system, PNM is required to own certain water rights which are dedicated to non-use. Some of these water rights are appurtenant to Pueblo Indian land and all are the subject of a currently pending water rights adjudication suit. (*State of New Mexico ex rel. S. E. Reynolds v. Aamodt*, United States District Court, District of New Mexico, No. CIV 6639 M.)

The decision below, by invalidating rights-of-way obtained under Section 17 of the Act ("Section 17"), threatens not only the ability of PNM to provide efficient and reasonable electric service generally, but also its ability to serve the Pueblos in its service area in compliance with New Mexico law. Additionally, dicta in the Tenth Circuit's opinion regarding the application of the Non-Intercourse Act to the Pueblos prior to 1924, may affect the water rights of PNM at issue in *Aamodt*.²

² In *Aamodt*, four Indian Pueblos—San Ildefonso, Tesuque, Nambe and Pojoaque—have challenged the water rights of approximately one thousand non-Indians, including PNM, who own land within Pueblo boundaries. The Pueblos' challenge is based in part on the assertion that the Indian Non-Intercourse Act of 1834 has been applicable to New Mexico Indian Pueblos continuously since 1851. The date the Non-Intercourse Act first applied to Pueblo land may be relevant to the determination of the ownership and priority of the water rights at stake in *Aamodt*. Whether the Act was retroactively applied by *United States v. Candelaria*, 271 U.S. 432 (1926), is an unresolved question. The conveyance here at issue occurred in 1928. The application of the Non-Intercourse Act to Pueblo Indians during the period at issue in *Aamodt* therefore is not presented by the facts of the instant case. Nevertheless, the Tenth Circuit implied in dicta that the Act has applied to Pueblo land since 1851. *Pueblo of Santa Ana v. Mountain States Telephone and Tele-*

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The Pueblo of Isleta and the United States, based upon the district court's decision in the captioned cause, have challenged the validity of five of PNM's rights-of-way in *Pueblo of Isleta v. Albuquerque Gas and Electric Company and Public Service Company of New Mexico*, United States District Court, District of New Mexico, Cause No. CIV-82-1535 C and *United States of America on behalf of the Pueblos of Isleta, Sandia, San Felipe, Santa Ana and Santo Domingo v. Public Service Company of New Mexico*, United States District Court, District of New Mexico, Cause No. CIV-82-1483 BB. The decision in the instant case will affect PNM's interests in these cases. The facts surrounding PNM's acquisition and use of the rights-of-way being challenged in the above-listed lawsuits are important to a complete understanding of PNM's interest in the instant case. Accordingly, they are more fully discussed below.

The Isleta Right-of-Way

In 1936, PNM acquired a fifty year right-of-way across the Pueblo of Isleta ("Isleta"); the right-of-way was for a term of 50 years, was twenty feet in width and approximately eight and one-half miles in length. (Portions of this grant were renewed in 1962 and 1976 as a result of line relocations under right-of-way acts other than the Pueblo Lands Act.) There has been no allegation that

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graph Co., 734 F.2d 1402, 1404-05 (10th Cir. 1984). A determination as to the date the Non-Intercourse Act first applied to Pueblo land may have a direct impact on the rights of the defendants in *Aamodt* who are not presently before Court. Such a determination need not and should not be made in the instant case.

the existence of this right-of-way has impaired Isleta's land value or precluded other uses of the land.

The 46 kV line constructed within this right-of-way connects a power station near Albuquerque to one near Belen, New Mexico. The line carries electricity to the residents and businesses of Isleta and to the communities of Los Lunas and Belen which lie to the south of Isleta. If PNM cannot utilize the right-of-way, it will not be able to provide efficient, reasonable and uninterrupted service to Isleta. Service to Los Lunas and Belen would also be jeopardized. In emergency situations, these communities and the Isleta could experience prolonged outages.

Present regulations of the Department of the Interior require the consent of the Indian tribe (which includes Pueblos in New Mexico) and the approval of the Secretary of the Interior or his authorized representative before any right-of-way across tribal lands can be granted or renewed. *See*, 25 C.F.R. §§ 169.3(a) and 169.19 (1984). If the district court finds PNM's right-of-way across Isleta invalid, PNM may not be able to maintain its electric line in its existing location on Isleta lands. Yet PNM would remain obligated to provide adequate and efficient electric service at just and reasonable rates to Isleta. PNM could also be put in the position of incurring the needless expenses associated with removing and then replacing its existing line.³ Isleta may have to bear part of this cost because the right-of-way exists in part to provide it with electric service.

³ Current costs of removing such electric lines average approximately \$10,000 per mile and costs of constructing electric lines, exclusive of the costs of obtaining rights-of-way, average approximately \$105,000 per mile.

The Isleta right-of-way was acquired by Albuquerque Gas and Electric Company ("AG&E"), the corporate name by which PNM was then known. By resolution dated June 29, 1936, the Governor and Lieutenant Governor and six other members of the Pueblo, presumably the Pueblo Council, consented to the grant, subject to the approval of the Secretary of the Interior as required by Section 17. The Superintendent of the United Pueblos of New Mexico then approved the grant and recommended its approval to the Secretary of the Interior. The Secretary, acting pursuant to Section 17, approved the grant in October 1936.

AG&E compensated Isleta for the right-of-way. Isleta obtained an additional benefit because the line constructed within the right-of-way brought electric power to Isleta's residents and businesses. (Interestingly, if the Tenth Circuit's construction of Section 17 is correct, the Pueblos would have been unable to obtain electric service in 1936 because no mechanism would have existed by which they could have conveyed rights-of-way for electric lines.)

PNM openly utilized the right-of-way for more than four decades before its validity was questioned. In 1982, Isleta filed suit, in response to the district court's decision in the captioned cause. After nearly fifty years of the right-of-way's existence, Isleta asserts that the agreement of the Governor and the Lieutenant Governor of the Pueblo and the Pueblo Council to convey the right-of-way, and the approvals of the United Pueblos' Superintendent and the Secretary of the Interior were not sufficient to convey the right-of-way. Isleta claims that a separate act of Congress, apart from the Pueblo Lands Act, was necessary before Isleta could voluntarily convey a limited term right-of-way necessary to obtain electric service.

The Sandia, Santa Ana, Santo Domingo and San Felipe Rights-of-Way

Between 1926 and 1928, PNM acquired rights-of-way for a subtransmission line between Albuquerque and Santa Fe, New Mexico from the Pueblos of Sandia, Santa Ana, Santo Domingo and San Felipe. Each right-of-way was twenty feet wide and was obtained pursuant to Section 17 for a fifty year term. Each was renewed under later right-of-way acts when its term expired.

Originally, the line constructed on these rights-of-way served two purposes—(i) to transmit electricity to the City of Santa Fe and (ii) to distribute electricity to the Pueblos whose lands it crossed. (Significantly, the power line constructed on the rights-of-way passes through the centers of the Pueblos to facilitate service to them. Compare the 115 kV transmission line built in 1958 from Albuquerque to Santa Fe, which follows a more direct route to Santa Fe. App. 1.) Presently, the line is used primarily to distribute electricity to the Indian residents and businesses of the Pueblos and to a small number of non-Indian residents and businesses located near the Pueblos; in fact, PNM has no other means of supplying them electricity.

In acquiring these rights-of-way, AG&E first obtained the consent of the Pueblos of Sandia, Santa Ana, San Felipe and Santo Domingo. As with the Isleta right-of-way, the Pueblo Governors and Lieutenant Governors and members of the Pueblo consented to the grants. The Supervisor of the Southern Pueblos Agency also approved the

grants.⁴ Finally, the Secretary of the Interior approved the grants. The Pueblos were compensated for the rights-of-way and further benefitted from their existence in that their businesses and residents have been provided with electric service from the line constructed thereon. The Pueblos have not alleged that these rights-of-way impair the value of their land or are inconsistent with other uses of the land.

PNM utilized these rights-of-way for decades without any question as to their validity. In 1982, the United States filed suit on behalf of the Pueblos seeking trespass damages and PNM's ejectment from these rights-of-way. In this suit, as in the Isleta suit, the plaintiff asserts that PNM is in trespass for utilizing rights-of-way that exist primarily to provide the Pueblos with electricity solely because these rights-of-way were obtained pursuant to Section 17.

As previously discussed, New Mexico law requires PNM to provide adequate, efficient and reasonable service at just and reasonable rates. Furthermore, PNM may not lawfully refuse electric service to persons in its service area who request service. N.M. Stat. Ann. § 30-13-2 (1978). PNM's statutory duties and the decision below place PNM in a curious position vis-a-vis the Pueblos. The Tenth Circuit's invalidation of the Section 17 rights-of-way threatens to make PNM a trespasser for providing electric service to the very people who have requested service but who are now complaining about PNM's right-of-way. PNM may

⁴ The Pueblos of Isleta, Sandia, San Felipe, Santa Ana, and Santo Domingo, as well as Acoma, Cochiti, Jemez, Laguna, and Zia are under the jurisdiction of the Southern Pueblos Agency.

be ejected from its rights-of-way yet remain obligated to provide the Pueblos adequate and efficient electric service at just and reasonable rates to those responsible for its ejectment. Because of these circumstances, PNM might be forced to incur the needless expenses of removing its lines from the contested rights-of-way and then obtaining additional rights-of-way and replacing these lines so as to provide the Pueblos service. Congress could not have intended such a result.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision incorrectly construes Section 17 to invalidate voluntary Pueblo conveyances approved by the Secretary of the Interior. This Court, rather than invalidating Section 17 conveyances, should find that Section 17 the Pueblo Lands Act authorized voluntary Pueblo conveyances made with Secretarial approval. The fact that Congress intended such a result is evident from the history of the enactment of Section 17, the language of Section 17 itself, and subsequent legislation. The Department of the Interior's contemporaneous and continuous construction of Section 17 provides further evidence that Section 17 authorized voluntary Pueblo conveyances. The Tenth Circuit ignored established rules of statutory construction in failing to give proper deference to the Department's construction.

PNM will not reiterate in detail the arguments of the Petitioner. PNM, with the Petitioner's consent, joins in and supports its arguments relating to the construction and interpretation of Section 17.

ARGUMENT

I. Congress Intended Section 17 to Empower the Pueblos to Voluntarily Grant Rights-of-Way with Secretarial Approval; Therefore, the Tenth Circuit Erred in Holding that the Conveyance at Issue is Void.

Section 17 empowered the Pueblos of New Mexico to voluntarily convey right-of-way interests in their lands, subject to the approval of the Secretary of the Interior. The conditions the Act sought to remedy, subsequent legislation and the consistent application of Section 17 to validate voluntary Pueblo conveyances demonstrate that this was the intent of Congress in enacting the Pueblo Lands Act.

A. The Conditions the Act Sought to Remedy

Passage of the Pueblo Lands Act was prompted by uncertainty as to the legal status of the New Mexico Pueblos. The unique character and life-style of the Pueblo Indians caused them to be viewed differently from other Indian groups in the United States and their legal status was sharply distinguished from that of most tribes. *See generally, Felix Cohen's Handbook of Federal Indian Law*, 92-96 (1982 ed.). Consequently, it was generally assumed that Pueblo Indians were subject to the laws of New Mexico and the propriety of subjecting Pueblo Indians to state law was upheld in *United States v. Joseph*, 94 U.S. 614 (1877). In *Joseph*, this Court held that the Pueblos were not subject to the federal protective laws, as were other Indian groups, because they were "too civilized". As a result, for over sixty years the Territorial and State courts of New Mexico applied New Mexico law to the Pueblo lands. Dur-

ing this period, non-Indians acquired interests in Pueblo lands through state law condemnations, executions on judgments, tax sales, adverse possession and similar proceedings. *See, Hearings on S. 3865 and S. 4223 Before Subcommittee of the Committee on Public Lands and Surveys, U.S. Senate, 67 Congress, 4th Session 230-35 (1923).*

In 1913, this Court held that the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, was constitutional in permitting Pueblo land to be treated as Indian country within the meaning of federal legislation prohibiting the introduction of intoxicating liquor on Indian land. *United States v. Sandoval*, 321 U.S. 28 (1913). Subsequently, this Court specifically held that the federal statutes restricting alienation did apply to the Pueblos. *United States v. Candelaria*, 271 U.S. 43 (1926). The *Sandoval* decision created doubt about the validity of interests acquired in Pueblo lands by non-Indians after the decision in *Joseph*. Congress was finally compelled to settle the confusion which resulted from these decisions.

B. The Pueblo Lands Act

Congress passed the Pueblo Lands Act to resolve the confusion regarding Pueblo status. The Pueblo Lands Act addressed three concerns — (i) resolution of the confusion surrounding title to Pueblo lands, (ii) prevention of a recurrence of the same problems, and (iii) extension of the federal protections to the Pueblos. The Pueblo Lands Board was created to resolve questions as to interests previously obtained in Pueblo land. The Act's remaining concerns were addressed in Section 17.

Section 17 was to prevent the then-existing conditions from recurring. The first clause of that Section contains this preventive measure. That clause provides:

No right, title or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico. . . .

Thus, interests in Pueblo land could no longer be acquired through the operation of New Mexico law. Section 17, therefore, prevented involuntary alienations of Pueblo land previously occasioned by application of New Mexico law.

The third concern of the Act, that the federal protections provided for in the Indian Non-Intercourse Act of June 30, 1834, 4 Stat. 730, 25 U.S.C. § 177, be extended to the Pueblos, was addressed by the second clause of Section 17. That clause provides:

. . . no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

This portion of Section 17 is very similar in structure and wording to the Non-Intercourse Act.⁵ A full comparison is made in the Petitioner's brief on the merits and will not be repeated here. Suffice it to say that, like the Non-

⁵ Compare the language of the Non-Intercourse Act which provides in pertinent part:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

Intercourse Act, Section 17 requires approval of Indian conveyances by the United States. Rather than requiring a treaty or convention, however, Section 17 provides for the United States' approval by the actions of its agent, the Secretary of the Interior. This approval, like that provided for in the Non-Intercourse Act, protects Pueblo lands from unwarranted intrusion or impairment by non-Indian interests and fulfills the federal government's responsibility as the guardian of the Indian peoples. Pueblo title was further protected because Pueblo lands would not be subject to *involuntary* alienation until Congress enacted specific legislation so providing.

There is no legislative history specifically relating to the enactment of Section 17. However, the Pueblo of Santa Ana, in its Brief in Opposition to Certiorari, directed this Court's attention to a letter which provides some elucidation of the meaning and purpose of Section 17.⁶ The letter is from Francis Wilson to the Indian Affairs Commissioner, Charles Burke. (App. 8.) Mr. Wilson was the Pueblo representative during the legislative hearings on the Pueblo Lands Act and apparently drafted Section 17. This letter directly supports the construction of Section 17 urged by Mountain States and PNM.

In his letter to Commissioner Burke, Wilson stated:

. . . I would like to call your attention to the fact that Section 17 of the Bill is, we think, the shortest way to prevent present conditions from recurring or existing again. Please look that section over and see if you

⁶ The Pueblo cited this letter as General Services Files 45918-1921-013, pt. 8. See Resp. Br. at 13, n. 5. This letter is fully reproduced herein at Appendix D.

do not agree with us on that point. This section is intended to cover the same ground as Section 2116 of the Revised Statutes [the Indian Non-Intercourse Act] but it is changed so as to accord with the conditions of the Pueblo Indians. . . . [Omitted discussion of Sections 18 and 19.] Those three sections are therefore not new but have precedent in the Revised Statutes mentioned applicable to other Indians, the last one mentioned putting into effect a criminal code. . . . As to the rest of the new provisions, they are for the most part for the purpose of making . . . a body capable of finding facts upon which future action can be taken whether by Congress or *by the Secretary of the Interior*. [Emphasis added.]

The change in Section 17, "so as to accord with the conditions of the Pueblo Indians," was the allowance of voluntary Pueblo conveyances with Secretarial approval. When the Pueblo Lands Act was passed, Congress understood that the Pueblos had the power to convey their land with Secretarial approval. *See*, 1923 Senate Hearings 72-73, 154-155, 229; 1923 House Hearings, 40-41. *See also*, *United States v. Candelaria*, *supra*. The Act allowed the Pueblos to continue to exercise this right of alienation. This statutory conveying mechanism was not novel. At the time of the passage of the Pueblo Lands Act, several existing statutes already empowered the Secretary of Interior to grant rights-of-way across Indian Lands. *See, e.g.*, Act of March 3, 1901, 31 Stat. 1083, 25 U.S.C. § 319 and Act of March 2, 1899, 30 Stat. 992, 25 U.S.C. § 315.

Mr. Wilson's letter, the circumstances surrounding the Act's passage and the post-*Sandoval* practice of allowing voluntary Pueblo conveyances with Secretarial approval make it clear that Congress enacted Section 17 to prevent further *involuntary* losses of Pueblo lands and to

require the United States' approval of Pueblo conveyances via approval of the Secretary of the Interior. The foregoing also demonstrate that an additional act of Congress was not required to empower the Secretary to validate voluntary Pueblo conveyances.

C. Subsequent Legislation

Statutes enacted in 1926 and 1928 provide further evidence that Section 17 did not require a subsequent act of Congress to validate voluntary conveyances approved by the Secretary, but did require a subsequent act to validate *involuntary* conveyances. In 1926, Congress passed the Act of May 10, 1926, 44 Stat. 498, which allowed non-Indians to condemn Pueblo lands for any public purpose. The Act was the direct result of the Jemez Pueblo's refusal to grant the Santa Fe and Northwestern Railway Company (the "Railway") a right-of-way across its land. The Railway, which provided rail service and employment for the Pueblo's members, had extended its tracks in reliance on the Act of 1899, referred to above. The Pueblo Lands Board determined that this Act did not apply to the Pueblo's communal fee interest and that the Railway had not obtained a valid right-of-way. *See*, House Report No. 94-800 to Committee on Interior and Insular Affairs regarding S. 217 (1976).

Representatives of the Pueblos, the Department of the Interior and the Railway met to resolve the problem. Those present at the meeting agreed that a reasonable construction of Section 17 would allow the Railway to obtain a valid right-of-way if the Pueblo would execute an easement deed which the Secretary then approved. *Id.*

and App. 10.⁷ However, the Pueblo refused to execute a deed. Congress therefore intervened and enacted this statute which authorized a conveyance of the right-of-way without the Pueblo's consent.

In 1928, when it appeared that the 1926 Act might be legally insufficient,⁸ Congress enacted further legislation to clarify that the Pueblos were subject to involuntary alienation of their lands for public purposes. Act of April 21, 1928, 45 Stat. 442, 25 U.S.C. § 322 (1982). This Act extended the right-of-way Acts then in effect to the Pueblos. The so-extended Acts authorized the Secretary to grant rights-of-way for specific purposes without the consent of the Pueblos.

It is not reasonable to suppose that Congress would have empowered the Secretary of the Interior, without the Pueblos' consent, to grant rights-of-way across Pueblo lands yet would have provided no mechanism to validate voluntary Pueblo conveyances. A reasonable construction of Section 17, in the context of subsequent congressional acts, is that it authorized the Secretary to validate voluntary conveyances of rights-of-way by the Pueblos.

⁷ This information comes from a letter included as an Appendix to the Pueblo's Brief in Opposition to Certiorari, and is fully reproduced herein at Appendix E. The Pueblo cited this letter as being in the National Archives, RCC. Sep. 60, File 210663, Sub. 3. See Resp. Br. at 10, n.3.

⁸ A New Mexico court had held that the 1926 Act was insufficient because it did not provide a means for joining the United States as a party. See the discussion in *Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna and United States*, 542 F.2d 1375 (10th Cir. 1976).

D. Section 17 Was Consistently Utilized to Validate Voluntary Conveyances

The Pueblos and the Secretary did not believe Congress had arbitrarily refused to authorize their voluntary right-of-way grants. Even after enactment of the 1926 and 1928 Acts, Section 17, rather than either of those Acts, was relied upon when a Pueblo consented to a conveyance. As discussed in the Petitioner's brief on the merits, at least sixty rights-of-way were granted pursuant to Section 17, over a period of thirty years. The last two such grants occurred in the late 1950s.

PNM's rights-of-way exemplify the use of Section 17 to validate a Pueblo's voluntary conveyances. In 1928 and in 1936, PNM could have utilized the 1926 Act, as the Act was utilized on at least twelve occasions, to condemn its rights-of-way. Instead, PNM obtained the Pueblos' consent and the Secretary's approval. Further supportive of the Petitioner's position, is the fact that in 1926 Francis Wilson, the drafter of Section 17 as the Pueblos' representative, urged the Secretary to approve whatever action the Sandia Pueblo took with regard to the PNM right-of-way.⁹ In his letter to the Secretary, Mr. Wilson indicated his belief that Section 17 authorized consensual grants, when coupled with Secretarial approval. (App. 16.)

E. Summary

The foregoing demonstrates that Congress intended Section 17 to authorize voluntary Pueblo conveyances

⁹ This information is contained in a letter from Mr. Wilson to the Secretary of the Interior, dated February 27, 1926, which was attached to the Complaint in *United States v. Public Service Company of New Mexico*, U.S. Dist. Ct. D.N.M., No. CIV-82-1483-BB. It is fully reproduced herein at Appendix F.

which were approved by the Secretary of the Interior. Section 17's application, by both the Pueblos and the Secretary, to authorize voluntary Pueblo grants, supports this conclusion. The Tenth Circuit's determination that Section 17 unambiguously required another act of Congress to authorize Pueblo conveyances is not supported by the language of the Pueblo Lands Act, its history or application.

Furthermore, the Tenth Circuit failed to apprehend the implications of its own determination. First, there could have been no voluntarily granted rights-of-way across Pueblo lands until the passage of the Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323-328, twenty-five years after the passage of the Pueblo Lands Act. Second, the Department of the Interior, whose responsibility it is to execute Congress' laws, would have violated Congress' plain intent for three decades. Third, the Pueblos, whose representative helped formulate the statute and apparently drafted Section 17, ignored a law which had been enacted for their benefit. Fourth, scores of grantees followed specific Section 17 procedures, when other means existed to obtain valid rights-of-way, despite the fact that Section 17 clearly provided no authority to convey interests in land.

Additionally, affirmance of the Tenth Circuit may have significant present-day consequences. To affirm the Tenth Circuit's decision would constitute a repudiation of mutually agreed-upon and officially sanctioned contracts. Such a result would disrupt relationships between the Pueblo Indians and the non-Indians with whom they conduct business. It could discourage such relationships and broadly undermine Indian business interests.

II. The Tenth Circuit Erred in Failing to Give Proper Deference to The Department of the Interior's Contemporaneous Construction of Section 17.

The Tenth Circuit determined that the thirty-year practice of the Department of the Interior, to authorize over sixty voluntary Pueblo conveyances, was contrary to law. The Tenth Circuit rejected the Department's construction of Section 17 stating:

[C]ourts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate. . . .

The Department's practice, said the Tenth Circuit, "violate[d] the plain congressional intent of § 17" which required an additional Act of Congress before Pueblos could convey any interest in their land. Congressional intent was plain, the court held, primarily because "[t]he two clauses of § 17 . . . are joined by the conjunctive 'and'." This "and" makes it clear that Congress had not authorized Pueblos to alienate their land and would not provide such authorization until it enacted further legislation. This determination, in light of established principles of statutory construction, is erroneous.

In characterizing Section 17, the Tenth Circuit failed to apply established principles of statutory construction, which recognize that:

[A] longstanding, uniform construction by the agency charged with the administration of the [Act], particularly when it involves a contemporaneous construction of the Act by the officials charged with the responsibility of setting its machinery in motion, is entitled to great respect.

Chemehuevi Tribe of Indians v. F.P.C., 420 U.S. 395, 410-411 (1975). This respect is even greater when Congress acquiesces in the administrative interpretation when specifically presented with an opportunity to express its dissatisfaction. See, *Saxbe v. Bustos*, 419 U.S. 65 (1974); *Chemehuevi Tribe of Indians v. F.P.C.*, *supra*. In 1926 and again in 1928, Congress was squarely confronted with the issue of the Pueblos' authority to convey interests in their land when it passed the Acts of May 10, 1926, and April 21, 1928. Congress did not express any dissatisfaction with the administrative practice then in effect of validating voluntary Pueblo conveyances.

The deference due to an administrative interpretation is "enhanced by the fact that Congress gave no indication of its dissatisfaction of the agency's scope of . . . its jurisdiction when it amended the Act." *Alabama Ass'n. of Insurance Agents v. Bd. of Governors of the Federal Reserve System*, 533 F.2d 224, 239 (8th Cir. 1976). Congress amended the Pueblo Lands Act in 1933. Act of May 31, 1933, 48 Stat. 108. At that time, Congress did not disturb the administrative practice then in effect for over six years. Accordingly, it may be assumed from Congress' silence that it consented to the practice. *United States v. Jackson*, 280 U.S. 183, 196-197 (1929) and *United States v. Midwest Oil Company*, 236 U.S. 459, 481 (1915). Here, the Tenth Circuit wholly disregarded these principles in its superficial examination of the language of Section 17.

Additionally, it is an established principle that agency officials charged with the responsibility of implementing a statute are held to have a better view of the statute's commands than a reviewing court has many years later. *Power Reactor Development Co. v. International Un-*

ion of Electrical, Radio & Machine Workers, 367 U.S. 396, 408 (1961); see also, *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 31 (1982). Here, the Tenth Circuit ignored this principle when it substituted its construction, almost sixty years after the passage of the Act, for the contemporaneous construction of the Department.

The Department's¹⁰ construction of Section 17 was reasonable and, in view of the above-discussed principles, should not have been invalidated by the Court of Appeals. *Udall v. Tallman*, 380 U.S. 1, 4 (1965). Accordingly, this Court should reverse the Tenth Circuit's decision, restore the agency's interpretation and find that the conveyance at issue is valid.

CONCLUSION

For the reasons stated herein, and in the brief of Mountain States, the decision of the Tenth Circuit should be reversed and the case should be remanded with directions to enter summary judgment for the Petitioner because Section 17 of the Pueblo Lands Act empowered the

¹⁰ PNM expects that the Pueblo of Santa Ana will argue that the Department's construction is not entitled to deference because it was first conceived by a Chicago lawyer attempting to solve the Santa Fe and Northwestern Railway Company's right-of-way problems. Who initially suggested that Section 17 authorized voluntary Pueblo conveyances appears to be unclear. What is clear, however, is that for thirty years the Department utilized Section 17 in this manner.

Pueblo to convey rights-of-way with the approval of the Secretary of the Interior.

Respectfully submitted,

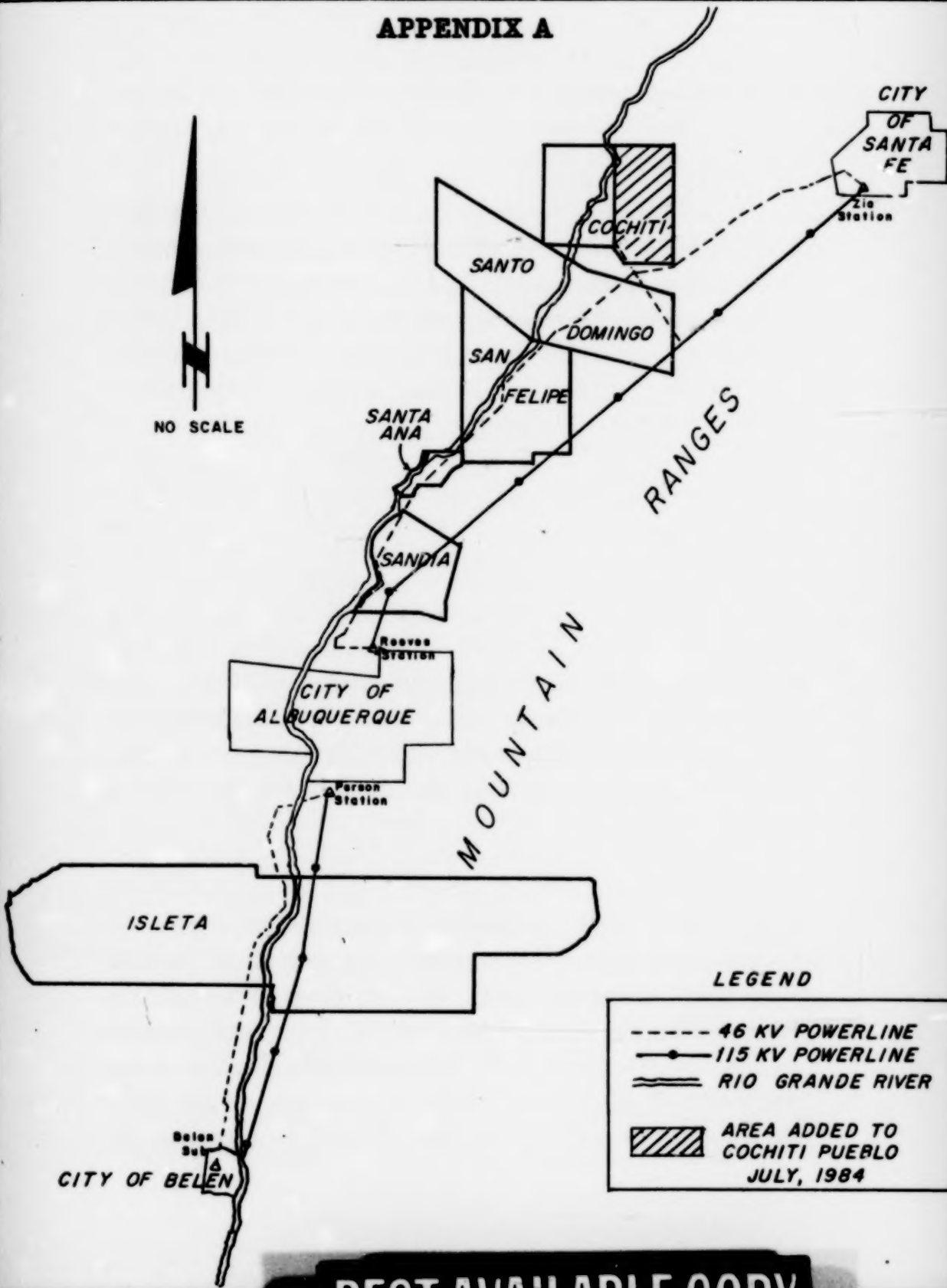
ROBERT H. CLARK
Counsel of Record

CLYDE F. WORTHEN
PAULA Z. HANSON
KELEHER & McLEOD, P.A.
P.O. Drawer AA
Albuquerque, New Mexico 87103
(505) 842-6262

Counsel for *Amicus Curiae*,
Public Service Company of
New Mexico

APPENDICES

APPENDIX A



APPENDIX B

Pueblo Land Act of June 7, 1924, Act of June 7, 1924, c. 331, 43 Stat. 636, as amended by Act of May 31, 1933, c. 45, § 7, 48 Stat. 108, provides:

"1. That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the United States of America, in its sovereign capacity as guardian of said Pueblo Indians shall, by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined.

"2. That there shall be, and hereby is, established a board to be known as 'Pueblo Lands Board' to consist of the Secretary of the Interior, the Attorney General, each of whom may act through an assistant in all hearings, investigations, and deliberations in New Mexico, and a third member to be appointed by the President of the United States.

• • •

"It shall be the duty of said board to investigate, determine, and report and set forth by metes and bounds, illustrated where necessary by field notes and plats, the lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community

by purchase or otherwise, title to which the said board shall find not to have been extinguished in accordance with the provisions of this Act

"3. That upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in the United States District Court for the District of New Mexico, as provided in section 1 of this Act, a suit to quiet title to the lands described in said report as Indian lands the Indian title to which is determined by said report not to have been extinguished.

"4. That all persons claiming title to, or ownership of, any lands involved in any such suit, or suits, may in addition to any other legal or equitable defenses which they may have or have had under the laws of the Territory and State of New Mexico, plead limitation of action . . .

• • •

"13. That as to all lands within the exterior boundaries of any lands granted or confirmed to the Pueblo Indians of New Mexico, by any authority of the United States of America or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise and which have not been claimed for said Indians by court proceedings then pending or the findings and report of the board as herein provided, the Secretary of the Interior at any time after two years after the filing of said reports of the board shall file field notes and plat for each pueblo in the office of the surveyor general of New Mexico at Santa Fe, New Mexico

"14. That if any non-Indian party to any such suit shall assert against the Indian title a claim based upon a

App. 4

Spanish or Mexican grant, and if the court should finally find that such claim by the non-Indian is superior to that of the Indian claim, no final decree or judgment of ouster of the said Indians shall be entered or writ of possession or assistance shall be allowed against said Indians, or any of them, or against the United States of America acting in their behalf. In such case the court shall ascertain the area and value of the land thus held by any non-Indian claimant under such superior title, excluding therefrom the area and value of lots or parcels of land the title to which has been found to be in other persons under the provisions of this Act: Provided, however, That any findings by the court under the provisions of this section may be reviewed on appeal or writ of error at the instance of any party aggrieved thereby, in the same manner, to the same extent, and with like effect as if such findings were a final judgment or decree. When such findings adverse to the Indian claim has become final, the Secretary of the Interior shall report to Congress the facts, including the area and value of the land so adjudged against the Indian claim, with his recommendations in the premises.

"15. That when any claimant, other than the United States for said Indians not covered by the report provided for in section 7 of this Act, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, purchase, or donation under the provisions of this Act, but has held and occupied any such parcel in good faith, claiming the same as his own, and the same has been improved, the value of the improvements upon the said parcel of land shall be found by the court and reported by the Secretary of the Interior to Congress, with his recommendations in the premises.

App. 5

"16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying such losing claimants the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

"17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

"18. That the pleading, practice, procedure, and rules of evidence shall be the same in all causes arising under this Act as in other civil causes in the Federal courts, except as otherwise herein provided.

App. 6

"19. That all sums of money which may hereafter be appropriated by the Congress of the United States for the purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any Pueblo or to any of the Indians of any Pueblo, shall be paid over to the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost to said Pueblo or to said Indians, or for purchase or construction of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians."

App. 7

APPENDIX C

Act of June 30, 1834, c. 161, Section 12, 4 Stat. 730, 25 U.S.C. § 177, provides:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

APPENDIX D

WILSON AND PERRY
Attorneys at Law
Salmon Building
Santa Fe, N.M.

December 18, 1923.

Hon. Chas. H. Burke,
Commissioner of Indian Affairs,
Washington, D. C.

Dear Mr. Commissioner:

Referring to your letter of the 12th inst., I would like to call your attention to the fact that Section 17 of the Bill is, we think the shortest way to prevent present conditions from recurring or existing again. Please look that section over and see if you do not agree with us upon that point. This section is intended to cover the same ground as Section 2116 of the Revised Statutes but it is changed so as to accord with the conditions of the Pueblo Indians.

Section 18 of the proposed legislation covers the same ground as Section 2118 and Section 2117 of the Revised Statutes except that the penalties in each instance have been doubled.

Section 19 is intended to cover the same ground as Section 2145 of the Revised Statutes excluding certain provisions applicable to Indian country which would not be appropriate for the government of Pueblo land grants by your office.

These three sections are therefore not new but have precedent in the Revised Statutes mentioned applicable to other Indians, the last one mentioned putting into effect

a criminal code as is in effect in other Indian reservations with the exception of the sections noted.

As to the rest of the new provisions, they are for the most part for the purpose of making of the Commission created by the bill, a body capable of finding facts upon which future action can be taken whether by Congress or by the Secretary of the Interior.

. . . [Here follows a lengthy discussion of a brief Wilson had received on an unrelated issue.] . . .

Sincerely yours,

/s/ Francis F. Wilson

APPENDIX E

Santa Fe, N.M.
February 27, 1926
c/o Pueblo Lands Board

United States as guardian of the
Pueblo of Jemez, v. Santa Fe
Northwestern Ry. Co.

The Attorney General,

Washington, D.C.

Sir:

This is one of the suits to quiet title following the report of the Pueblo Lands Board. It is at issue and could be tried at any time when a Federal Judge is available. There has recently occurred a new development, however.

This railroad was started as a private logging railroad, but has more or less developed until it is now about 40 miles long and has been recognized as a common carrier by the Interstate Commerce Commission. A further extension of 20 miles is being arranged, and it is locally hoped and expected that still further extensions will be made and that the road will be a valuable agency in developing the state.

Its right-of-way crosses not only Jemez but three other Pueblos, and was obtained in each case under the 1899 Act: U.S. Compiled Statutes, Section 4181, et. seq. The Pueblo Lands Board concluded that this Act was not broad enough to cover lands owned in fee by the Pueblo Indians and reported that the title to the land occupied by the Railway remained unextinguished in the Indians, subject to the easement of right-of-way, if any valid easement had been actually acquired. I agreed with the Board in

believing that the Act of 1899 did not cover in this case. For this reason, and under the express requirements of the Pueblo Lands Act, a suit to quiet title became inevitable. You will find a discussion, both of the facts and law, in my letters of November 4th and November 27, 1925, to you.

It now transpires that at the time the suit was filed, viz: about January 8, 1926, the White Pine Lumber Company, which is practically identical with the Railway Company, was negotiating a loan of over a million dollars to be secured by a bond issue covering properties, as I understand it, both of the Lumber Company and of the Railway Company, the proceeds to be used for further development work. The suit evidently came as a great surprise to the Railway Company, which had apparently not studied the Act of 1899 carefully and which, having fully complied with all the requirements of the Department of the Interior, believed its title to be sound. The bond houses in Chicago, which were preparing to underwrite the bond issue, immediately took cognizance of the situation, and after some correspondence a conference was had here yesterday, at their request. There were present, Governor H. J. Hagerman, who represents the Secretary of the Interior on the Pueblo Lands Board; Mr. Cochrane, Special Attorney for the Pueblo Indians; Judge Hanna, of Albuquerque, who is attorney for some of the Indian Aid societies and, as well, for local companies desirous of obtaining rights of way for power lines across some of the Pueblos; Mr. Porter, Vice-President of the Railway Company; Judge Hawley, of Chicago, representing the bond houses; and myself. The results of a lengthy discussion may be briefly summarized thus:

1. The Railway and Bond house representatives could not offer any plausible defense to the suit. In other words, while they would not admit that the Act of 1899 was inapplicable, it was quite clear that they felt such to be the case.

2. It was the general sense of all present that while the Pueblos should be protected in every way, their peculiar status ought not to put them in a more favored position than other Indians or than white men, so as to be able to prevent railways, telegraph and telephone and power lines, etc. from crossing their grants. It also seemed fairly clear that this Railway has been a benefit rather than a detriment to the Jemez pueblo, being of some value to the Indians for transportation, and affording employment to a number of them. As above stated, this enterprise is favorably regarded in New Mexico as an existing agency of development which promises to be increasingly valuable to the state.

3. It was therefore felt that the government should not interfere with the Railway or its projected loan further than duty absolutely required, and there was much discussion as to how the right-of-way could be legalized. One alternative is offered by Section 17 of the Pueblo Lands Act, reading:

"Sec. 17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community,

or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

This section presents one of the numerous puzzles offered by the Act. At first reading the two halves of the section seem contradictory; the first saying that no title to the Pueblo Lands shall be acquired except under subsequent legislation by Congress, and the second half saying, in effect, that conveyance by Pueblos, or individuals thereof, may be valid if approved by the Secretary of the Interior. We concluded, however, that the two halves might be harmonized by construing the first to mean that no title could be adversely acquired except under subsequent acts of Congress, and the second to mean that the Pueblos might voluntarily convey, and that such conveyance would be good if approved by the Secretary. Like so many other feature [sic] of this Act, the foregoing construction cannot be considered certain, but seems reasonable.

Since the conference, defendant's representatives have announced a purpose of immediately approaching the Secretary of the Interior in an attempt to agree upon a form of deed acceptable to him, which they will then try to have executed by the Pueblo authorities, and returned to Washington for approval. If all this succeeds, the bonding houses will apparently be willing to make the proposed loan.

In any effort to procure a conveyance from the Pueblo, the Company will doubtless be met with a demand for additional compensation. I have heretofore expressed a doubt whether the damages already paid are adequate, and if the general scheme is approved, the question of in-

creased compensation will be looked into by the Special Attorney for the Pueblo Indians. You will note that Section 17 does not expressly say that Pueblo conveyances shall hereafter be valid if approved by the Secretary, but merely that they shall *not* be valid unless so approved. Theoretically, and in fact, the Pueblo Indians are incompetent to manage their own affairs, and I think it unfortunate if the Pueblo corporations — and still more the individual Indians — are now authorized to convey, even subject to an approval, which must usually be based on the recommendation of some local official who may or may not be fully informed and disinterested. However, in the present instance the railway is already constructed and cannot well be got rid of; it has paid a considerable sum (nearly \$3,000 to Jemez Pueblo) as damages; it appears to be a public benefit; and if it deems this method of curing its title sufficient, and can bring it about, I think the general good would be served by acquiescing rather than by urging the doubts suggested by Sec. 17.

4. In the long run, I believe that the only certain way of rectifying the general situation is by Act of Congress. It is fair that the Pueblos should be subject to the acquisition of rights of way for public utilities of all sorts, just as other Indians are, on payment of just compensation. It was suggested at the conference that it would not be difficult to frame an Act making the provisions of U.S. Compiled Statutes, Section 4181, et. seq., applicable to the Pueblos; but defendant has apparently decided to try the other course first.

5. One result of all the foregoing is that the Railway Company would like the suit to lie dormant until they can make an attempt to validate their title by one or the

other of the above methods. If either should succeed, the controversy would become moot and the suit could be dismissed. They are naturally reluctant to run the risk of a judgment declaring in effect that they are trespassers, and call attention to their good faith and to the prima facie validity of the permit of the Secretary under which they acted. They also promise immediate action in the way above indicated, and obviously they cannot hope otherwise to obtain their loan.

I therefore ask authority to suspend proceedings in this suit for a reasonable time, until we see what they can accomplish.

I understand that Governor Hagerman and Mr. Cochran agree with my views as to the desirability of assisting rather than thwarting the railway project, and that the former will so report to the Department of the Interior.

Respectfully,

/s/ GEO. A. H. FRASER
Special Assistant to
the Attorney General

APPENDIX F

February 27, 1926

The Honorable Secretary of Interior,
Washington, D. C.

Sir:

The Albuquerque Gas and Electric Company of Albuquerque, New Mexico, has planned a large power plant at Bernalillo and expects to construct a forty-four thousand volt transmission line from that point to Albuquerque. The proposed line will run over the land of the Sandia Pueblo. Under the act creating the Pueblo Lands Board (Section 17) such a lease or grant must be approved by the Secretary of the Interior, and assuming that the Company will be able to obtain the permission of the Indians and a deed or a right of way grant is given the Company by the Indians, their action will be subject to your approval.

So far as the Indians are concerned the proposed right of way runs through bosque lands for the most part not in cultivation, and it cannot in any manner, that I can see, injure the Indians or impair the value of their property. In view of this fact and the further fact that the project will be very beneficial to Albuquerque and the territory between that City and Bernalillo, I desire to express my hope that you will approve any action that the Indians may take in the premises.

Very respectfully,
/s/ Francis C. Wilson

W:W

In the Supreme Court of the United States

October Term, 1984

—o—
**THE MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,**

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

—o—
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

—o—
PROOF OF SERVICE

—o—
The undersigned, a member of the Bar of the Supreme Court of the United States and Counsel of Record for Public Service Company of New Mexico, *amicus curiae* herein, hereby certifies that on November 21, 1984, pursuant to Rule 33 of the Rules for the United States Supreme Court, service of the Motion for Leave to File Brief *Amicus*

Curiae and Brief of *Amicus Curiae* Public Service Company of New Mexico in Support of the Position of the Petitioner was made upon:

Kathryn Marie Krause, Esq.
931 14th Street, Suite 1300
Denver, Colorado 80202
Counsel of Record for Petitioner

and

Richard W. Hughes, Esq.
Scott E. Borg, Esq.
201 Broadway, S.E.
Albuquerque, New Mexico 87103
Counsel of Record for Respondent

by depositing three correct copies of same in the United States mail, with first class postage prepaid, properly addressed as listed above.

All parties required to be served have been served.

DATED: November 21, 1984.

ROBERT H. CLARK
Counsel of Record

CLYDE F. WORTHEN
PAULA Z. HANSON
KELEHER & MCLEOD, P.A.
P.O. Drawer AA
Albuquerque, New Mexico 87103
(505) 842-6262

Counsel for *Amicus Curiae*,
Public Service Company of
New Mexico

10
No. 84-262

Office-Supreme Court, U.S.
FILED

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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH
COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

WILLIAM H. ALLEN
RUSSELL H. CARPENTER, JR.
LAIRD HART
Covington & Burling
1201 Pennsylvania Avenue,
N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

Attorneys for Petitioner

KATHRYN MARIE KRAUSE*
MARY C. SNOW
931-14th Street
Room 1300
Denver, Colorado 80202
(303) 624-2200

November 1984

**Counsel of Record*

64pp

QUESTIONS PRESENTED

1. Whether under Section 17 of the Pueblo Lands Act of 1924, a New Mexico Indian Pueblo can convey a right-of-way across its land if it obtains the approval of the Secretary of the Interior or whether, on the other hand, it can make no conveyance of any interest in any of its land without the sanction of a further congressional enactment.

2. Whether a trespass action by a New Mexico Indian Pueblo against a good-faith claimant to a right-of-way across the Pueblo's land is barred by *res judicata* when, in a previous suit brought by the United States on behalf of the Pueblo to quiet title to the Pueblo's lands and enjoin alleged trespasses, the plaintiff United States moved for and secured a court order dismissing the claimant as a defendant on the ground, recited by the court, that the claimant enjoyed a valid title to the right-of-way by agreement with the Pueblo.*

*All the parties are named in the caption. The petitioner's corporate affiliates are listed at page ii of the petition for certiorari.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
The Status of the Pueblo Indians Before 1924. .	4
The Pueblo Lands Act	6
The 1928 Right-of-Way Conveyance	6
Other Conveyances Pursuant to Section 17	7
The Dismissal of Mountain Bell from the Santa Ana Quiet Title Suit	8
The Present Action	9
SUMMARY OF ARGUMENT	11
ARGUMENT	14
I. THE PUEBLO OF SANTA ANA CONVEYED TO MOUNTAIN BELL A RIGHT-OF-WAY FOR ITS TELEPHONE LINE ACROSS PUEBLO LAND, WHICH WAS MADE EFFECTIVE BY THE APPROVAL OF THE SECRETARY OF THE INTERIOR UNDER SECTION 17 OF THE PUEBLO LANDS ACT OF 1924; NO ADDITIONAL GOVERNMENTAL APPROVAL WAS REQUIRED	15
A. By Its Terms, Fairly Read, Section 17 Permits Consensual Transfers of New Mexico Indian Pueblo Lands if the Approval of the Secretary of the Interior Is Had	16
B. The History of the Pueblo Lands Act and the Context It Provides for Section 17 Confirm that Section 17 Permits Consensual Transfers of Pueblo Land with the Approval of the Secretary of the Interior .	21

Table of Contents Continued

	Page
C. Section 17, Construed as Requiring Approval by the Secretary of the Interior of Conveyances of Interests in Land by the Pueblos, Fits Squarely in the Tradition of Federal Indian Law	26
D. Even if There Were More Doubt than There Is About the Meaning of Section 17, Deference Would Have to Be Given to the Consistent Administrative Construction that It Authorizes Voluntary Conveyances by the Pueblos with the Approval of the Secretary of the Interior	32
II. THIS SUIT IS BARRED BY A PRIOR ADJUDICATION OF MOUNTAIN BELL'S TITLE TO THE DISPUTED RIGHT-OF-WAY IN A SUIT BETWEEN THE SAME PARTIES	39
A. The Court Below Erred in Holding that the <i>Brown</i> Decree Was Not Final	40
1. In 1928 the Dismissal of a Bill in Equity Was Presumed to Be on the Merits, and with Prejudice, Unless Otherwise Stated	40
2. The Dismissal Was with Prejudice for the Further Reason that It Was Expressly Based on a Resolution of the Underlying Dispute	42
B. All the Circumstances Support Application of Res Judicata in this Case	44
CONCLUSION	47

TABLE OF AUTHORITIES

CASES:	Page
<i>Barrett v. Virginian Ry.</i> , 250 U.S. 473 (1919)	40
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	32
<i>Carlisle v. Smith</i> , 224 F. 231 (N.D. Ga. 1915), decree rev'd on other grounds, 228 F. 666 (5th Cir. 1916)	42
<i>Chemeheuvi Tribe of Indians v. FPC</i> , 420 U.S. 395 (1975)	35
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 104 S. Ct. 2778 (1984)	33
<i>Chouteau v. Molony</i> , 16 How. 203 (1853)	23
<i>Columbia Broadcasting System, Inc. v. Democratic National Committee</i> , 412 U.S. 94 (1973)	33
<i>Durant v. Essex Co.</i> , 7 Wall. 107 (1868)	41-42
<i>E.I. Du Pont de Nemours & Co. v. Collins</i> , 432 U.S. 46 (1977)	33
<i>Federal Election Comm'n v. Democratic Senatorial Campaign Committee</i> , 454 U.S. 27 (1981)	15, 33
<i>Home Owners' Loan Corp. v. Huffman</i> , 134 F.2d 314 (8th Cir. 1943)	40
<i>House v. Mullen</i> , 22 Wall. 42 (1874).	42
<i>Indian Land & Trust Co. v. Shoenfelt</i> , 135 F. 484 (8th Cir. 1905)	41
<i>Individual Drinking Cup Co. v. Union News Co.</i> , 250 F. 625 (2d Cir. 1918)	41
<i>La Roque v. United States</i> , 239 U.S. 62 (1915)	33
<i>Leo Sheep Co. v. United States</i> , 440 U.S. 668 (1979) ..	46
<i>Lindley v. Denver</i> , 259 F. 83 (6th Cir. 1919)	41
<i>Lomax v. Pickering</i> , 173 U.S. 26 (1899)	31
<i>Lyon v. Perin & Gaff Mfg. Co.</i> , 125 U.S. 698 (1888) ..	42
<i>Martin v. Evans</i> , 85 Md. 8, 36 A. 258 (Md. App. 1897)	42
<i>McClanahan v. Arizona State Tax Comm'r</i> , 411 U.S. 164 (1973)	27
<i>McLaren v. Fleischer</i> , 256 U.S. 477 (1921)	38

Table of Authorities Continued

CASES:	Page
<i>Minnesota Co. v. National Co.</i> , 3 Wall. 332 (1865) .	38, 46
<i>Mitchel v. United States</i> , 9 Pet. 711 (1835)	26-27
<i>Nevada v. United States</i> , 103 S. Ct. 2906 (1983) ...	39-46
<i>Newton v. Kemper</i> , 66 S.E. 102 (W.Va. 1909)	42
<i>Norwegian Nitrogen Products Co. v. United States</i> , 288 U.S. 294 (1933)	35
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	27, 32
<i>Pickering v. Lomax</i> , 145 U.S. 310 (1892)	31
<i>Piper v. Chris-Craft Industries, Inc.</i> , 430 U.S. 1 (1977)	38
<i>Plains Electric Generation and Transmission Cooper- ative, Inc. v. Pueblo of Laguna</i> , 542 F.2d 1375 (10th Cir. 1976)	37
<i>Power Reactor Development Co. v. International Union of Electrical Radio & Machine Workers</i> , 367 U.S. 396 (1961)	35, 38
<i>Rice v. Rehner</i> , 103 S. Ct. 3291 (1983)	32
<i>Scott v. First National Bank of Morris</i> , 285 F. 832 (8th Cir. 1922)	42
<i>Smith v. Stevens</i> , 10 Wall. 321 (1870)	31
<i>Stickney v. Goudy</i> , 132 Ill. 213, 23 N.E. 1034 (Ill. 1890).	42
<i>Talton v. Mayes</i> , 163 U.S. 376 (1896)	27
<i>Udall v. Tallman</i> , 380 U.S. 1 (1965)	33, 35
<i>United States v. Candelaria</i> , 271 U.S. 432 (1926) ..	5, 21-23
<i>United States v. Clark</i> , 454 U.S. 555 (1982)	38
<i>United States v. Joseph</i> , 94 U.S. 614 (1876).	4, 21-22
<i>United States v. Lucero</i> , 1 N.M. 422 (1869)	21
<i>United States v. Mares</i> , 14 N.M. 1, 88 P. 1128 (1907). .	5
<i>United States v. Parker</i> , 120 U.S. 89 (1887).	42-44
<i>United States v. Pico</i> , 5 Wall. 536 (1867)	23
<i>United States v. Sandoval</i> , 231 U.S. 28 (1913)	passim
<i>United States v. Santistevan</i> , 1 N.M. 583 (1874)	21

Table of Authorities Continued

CASES:	Page
<i>United States v. Title Insurance & Trust Co.</i> , 265 U.S. 472 (1924)	38, 46
<i>United States v. Vogel Fertilizer Co.</i> , 455 U.S. 16 (1982)	38
<i>United States v. Wheeler</i> , 435 U.S. 313 (1978)	27
<i>Walden v. Bodley</i> , 14 Pet. 156 (1840)	42
<i>Worcester v. Georgia</i> , 6 Pet. 515 (1832)	27
<i>Zemel v. Rusk</i> , 381 U.S. 1 (1965)	33
<i>Zenith Radio Corp. v. United States</i> , 437 U.S. 443 (1978)	33, 38
STATUTES:	
Act of July 22, 1790, 1 Stat. 137	27
Act of March 1, 1793, 1 Stat. 329	27
Act of May 19, 1796, 1 Stat. 469	27
Act of March 3, 1799, 1 Stat. 743	27
Act of March 30, 1802, 2 Stat. 139	27
Indian Trade and Intercourse Act of 1834, 4 Stat. 730 25 U.S.C. § 177	4, 22, 27
Act of February 27, 1851, 9 Stat. 574	4, 22
Act of March 3, 1871, 16 Stat. 566, 25 U.S.C. § 71 ...	28
Conformity Act of June 1, 1872, 17 Stat. 197, repealed by the Act of June 25, 1948, 62 Stat. 992	40
Act of February 28, 1891, 26 Stat. 795	30
Act of March 2, 1899, 30 Stat. 990, 23 U.S.C. §§ 312-18	35
Act of June 21, 1906, 34 Stat. 327, 25 U.S.C. § 409. ..	30
Act of March 3, 1909, 35 Stat. 783, 25 U.S.C. § 395. ..	30
Act of June 25, 1910, 36 Stat. 856, 25 U.S.C. § 403. ..	30
Act of June 25, 1910, 36 Stat. 857, 25 U.S.C. § 406 ...	30
Act of June 25, 1910, 36 Stat. 857, 25 U.S.C. § 407. ..	30
Act of March 3, 1921, 41 Stat. 1232, 25 U.S.C. § 393 .	30
Act of September 21, 1922, 42 Stat. 995, 25 U.S.C. § 392	30

Table of Authorities Continued

STATUTES:	Page
Pueblo Lands Act of June 7, 1924,, 43 Stat. 636. ..	<i>passim</i>
Act of April 21, 1928, 45 Stat. 442, 25 U.S.C. § 233 ..	37
Act of February 11, 1936, 49 Stat. 1135, 25 U.S.C. § 393a	30
Act of July 2, 1945, 59 Stat. 313	30
Act of August 9, 1955, 69 Stat. 199, 25 U.S.C. §415 ..	30
25 U.S.C. §397	30
25 U.S.C. § 323-28	37
Rule 41, Fed. R. Civ. P.	13, 40-41
Rule 86, Fed. R. Civ. P.	40
OTHER AUTHORITIES:	
H.R. Rep. No. 800, 94th Cong., 2d Sess. (1976)	35
S. Rep. No. 148, 94th Cong., 1st Sess. (1975)	35
H.R. Rep. No. 787, 68th Cong., 1st Sess. (1924)	25
S. Rep. No. 492, 68th Cong., 1st Sess. (1924) ...	23, 25, 45
H.R. Rep. No. 1748, 67th Cong., 4th Sess. (1923)	46
H.R. Rep. No. 1730, 67th Cong., 4th Sess. (1923)	46
S. Rep. No. 1175, 67th Cong., 4th Sess. (1923)	45
2B W. Barron & A. Holtzoff, <i>Federal Practice and Procedure</i> (1961 ed.)	41
F. Cohen, <i>Handbook of Federal Indian Law</i> (1942) ..	<i>passim</i>
R. Powell & P. Ronam, <i>Powell on Real Property</i> (1984 ed.)	19
<i>Hearings on S. 3865 and S. 4223 Before a Subcomm. of the Senate Comm. on Public Lands and Surveys</i> , 67th Cong., 4th Sess. (1923)	<i>passim</i>
<i>Hearings on H.R. 10452 and H.R. 10674 Before the House Committee on Indian Affairs</i> , 67th Cong., 4th Sess. (1923)	<i>passim</i>
<i>The Legal Status of the Indian Pueblos of New Mexico and Arizona</i> , 57 I.D. 36 (Aug. 9, 1939)	34

IN THE
Supreme Court of the United States

¹ October Term, 1984

No. 84-262

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH
COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the District of New Mexico is not reported. It is reproduced at pages 85-94 of the Joint Appendix. The opinion of the Court of Appeals for the Tenth Circuit, which is reported at 734 F.2d 1402, is reproduced at pages 96-108 of the Joint Appendix.

JURISDICTION

The judgment of the court of appeals, affirming on an interlocutory appeal the district court's partial summary judgment in favor of the respondent (J.A. 108), was entered on May 14, 1984. A petition for a writ of certiorari was filed on August 13, 1984, and the writ was granted on October 9, 1984. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 17 of the Pueblo Lands Act, the Act of June 7, 1924, 43 Stat. 641 (never codified), provides:

- "No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

The other provisions of the Pueblo Lands Act, 43 Stat. 636, are set forth in an appendix to the petition for certiorari (Pet. App. 25-38).

STATEMENT

Petitioner Mountain States Telephone and Telegraph Company (hereinafter sometimes referred to as Mountain Bell) is the principal provider of local and intrastate telephone service in New Mexico. Substantial parts of the land of New Mexico, lying athwart natural lines of communication, are owned by Indian Pueblos, including the respondent Pueblo of Santa Ana. In order to provide efficient and economical service between

New Mexico communities (and to serve the Pueblos themselves) Mountain Bell's lines must cross some Pueblo lands. Between about 1905 and 1980 a line of telephone poles crossed land owned by the Pueblo of Santa Ana, along what Mountain Bell believed to be a valid right-of-way obtained from the Pueblo.¹

The validity of the original 1905 right-of-way was cast in doubt by judicial decisions concerning the status of the Pueblo Indians. Thereafter remedial legislation was enacted by Congress in 1924. Upon the payment by Mountain Bell of compensation, the Pueblo of Santa Ana made a new conveyance to Mountain Bell of the right-of-way for its line of telephone poles, with the approval of the Secretary of the Interior as required by the 1924 statute. A quiet title suit brought pursuant to the same remedial statute to remove clouds on the title to the Pueblo's land was dismissed by the district court as against Mountain Bell, on the strength of the same new right-of-way grant.

Now, the Pueblo has brought suit against Mountain Bell repudiating its conveyance of the right-of-way. The Pueblo claims that the remedial statute was misunderstood at the time by itself, by Mountain Bell, and by the Government, and has been misunderstood since; and that, contrary to the parties' 50 years' understanding, the statute did not authorize the grant of the right-of-way. The Pueblo further claims that the court's dismissal of Mountain Bell from the earlier quiet title suit on the ground that the right-of-way grant entitled it to judgment

¹ The Pueblo of Santa Ana alleged in its amended complaint that its governing body did not grant permission for the original construction of Mountain Bell's telephone line across its land (J.A. 5); Mountain Bell said in its answer that it obtained rights-of-way across the Pueblo's land in 1904 or 1905 and denied for want of information and belief the Pueblo's allegation of lack of permission from its governing body (J.A. 8-9). For reasons indicated below, there has been no adjudication of the issues as they relate to the period between 1905 and 1928.

is not an adjudication to be given preclusive effect. The result of the decision below sustaining this uningratiating claim is that the Pueblo may be entitled to an accounting of profits and to damages (which, to be sure, might be nominal) for the "trespass" of Mountain Bell's lines on its land — a "trespass" that it invited and for which it was paid. The result will also be that innocent, good-faith purchasers from New Mexico Pueblos of rights-of-way for public service facilities such as communications, gas and electric utilities and railroad lines can be ejected unless they pay for their rights-of-way a second or even a third time.

The Status of the Pueblo Indians Before 1924

A corporate predecessor to Mountain Bell acquired a right-of-way in 1904 or 1905 (*see* note 1, *supra*) and constructed a part of the El Paso-Denver telephone trunkline across the tract of land known as El Ranchito owned by the Pueblo of Santa Ana. At that time there was every reason to believe that the Pueblos of New Mexico, unlike other Indian communities and tribes, could freely convey to others rights-of-way and other interests in the lands they owned. New Mexico was then a territory, and in *United States v. Joseph*, 94 U.S. 614 (1876), this Court affirmed a judgment of the territorial courts that a section of the Indian Trade and Intercourse Act of 1834 (the "Non-Intercourse Act"), 4 Stat. 729, 730, that made trespassing on Indian lands subject to a federal penalty, was not applicable to the Pueblos even though the statute had been extended in 1851 to Indian Tribes in New Mexico, 9 Stat. 574, 587. The Court described the Pueblo Indians, with their stable fixed communities, as having reached a state of civilization above that of most Indians and concluded that they were therefore not "Indians" subject to the 1851 extension.² The *Joseph* opinion con-

² Descriptions of the Pueblos and their history under Spanish, Mexican, and United States rule, giving rise to what was thought to be their special status, are contained in the opinion in *Joseph* and later opinions of this Court, discussed just below.

firmed the general understanding resulting from the decisions of the territorial courts that the Pueblos managed their own affairs, including land transactions, without federal supervision or interference.

A provision of the New Mexico Enabling Act of 1910 stated that "the terms 'Indian' and 'Indian country' shall include the Pueblo Indians of New Mexico and the lands now owned or occupied by them." 36 Stat. 557. In *United States v. Sandoval*, 231 U.S. 28 (1913), the Court sustained the constitutionality of this provision in holding that the prohibition on introducing liquor into Indian country applied to the New Mexico Pueblos, which the territorial Supreme Court had held six years before were not subject to that ban.³ This Court also indicated that, even apart from the 1910 Enabling Act, the statements in *Joseph* distinguishing the Pueblo Indians from other Indians in terms of their amenability to federal legislation applicable to Indians generally could no longer be relied on. 231 U.S. at 48-49.

Since the 1834 Non-Intercourse Act applicable to Indians generally prohibited the alienation of Indian land except pursuant to treaty, *Sandoval* called in question all the land titles obtained from the Pueblo Indians during the time when they had been regarded as not subject to federal Indian laws. This Court did not squarely hold the Pueblos subject to the Non-Intercourse Act until 1926 when it decided *United States v. Candelaria*, 271 U.S. 432. But "[t]he effect of the *Sandoval* decision was to spread consternation among the people of New Mexico who held lands to which the Pueblos laid claim." F. Cohen, *Handbook of Federal Indian Law* 389 (1942). Congress enacted the Pueblo Lands Act in 1924 to bring order to the confused Pueblo land regime.

³ *United States v. Mares*, 14 N.M. 1, 88 P. 1128 (1907).

The Pueblo Lands Act

The Pueblo Lands Act of 1924 (Pet. App. 25-38) established the Pueblo Lands Board, consisting of the Attorney General, the Secretary of the Interior, and a presidential appointee, charged with determining the boundaries of the several Pueblos and initially hearing the cases of non-Indian claimants to Pueblo land. § 2 (Pet. App. 25-26). The Lands Board was to file a report for each Pueblo listing the lands to which its title had not been extinguished by adverse possession or other similar means, and the Attorney General was directed to bring suits to quiet title to all the lands so listed. §§1, 2, 3 (Pet. App. 25-26). The Act specifically provided for recognition, in the Lands Board's determinations and the quiet title suits, of interests acquired against the Pueblos by prescriptive means, on terms derived from New Mexico law governing adverse possession. §§2, 4 (Pet. App. 25-28).

Both the Lands Board determinations and the quiet title suits were addressed to the effect on Pueblo Indian titles of *past* conduct and would determine the *present* status quo. Congress enacted Section 17 of the Pueblo Lands Act (p. 2, *supra*), whose proper construction is in issue here, to govern *future* dispositions of Pueblo lands.

The 1928 Right-of-Way Conveyance

Acting pursuant to Section 17 of the Pueblo Lands Act, the Pueblo of Santa Ana and Mountain Bell executed a right-of-way agreement on February 23, 1928. (J.A. 38-43.) The agreement was signed on behalf of the Pueblo by its governing officials and recited that they had "full power and authority to execute instruments conveying easements and rights of way across the lands owned and controlled by the Pueblo . . . subject, however, to the approval of the Secretary of the Interior." (J.A. 38-39.) The instrument granted to Mountain Bell an "easement to construct, maintain and operate a telephone . . . pole line," along a designated line across that part of the lands of the

Pueblo known as El Ranchito. (J.A. 39-40.) The monetary consideration was stated to be \$101.60. (J.A. 39.)

The superintendent of the Bureau of Indian Affairs' Southern Pueblos Agency in Albuquerque forwarded the right-of-way agreement to the Commissioner of Indian Affairs in Washington. (J.A. 180-81.) The superintendent had attended the negotiations between the Pueblo officials and the Mountain Bell representatives and, in recommending approval of the agreement by his superiors, said that he believed the price to be paid by Mountain Bell was fair — "a little higher than the price paid by this company to some of the other pueblos" because the Santa Ana Pueblo claimed some land that was in dispute and Mountain Bell gave it the benefit of the doubt. The price amounted to 80 cents a pole for 127 poles. The Commissioner of Indian Affairs in turn wrote to the Secretary of the Interior, endorsing the superintendent's description of the transaction as fair and recommending that it be approved by the Secretary pursuant to Section 17 of the Pueblo Lands Act. (J.A. 182-83.) Assistant Secretary Edwards, acting upon the BIA recommendation, approved the agreement pursuant to Section 17 on April 13, 1928. (J.A. 43.)

Other Conveyances Pursuant to Section 17

The Santa Ana-Mountain Bell agreement was only one of a large number of right-of-way conveyances by New Mexico Pueblos that the Secretary of the Interior or an assistant secretary approved pursuant to Section 17 beginning soon after the enactment of the Pueblo Lands Act. Fifty-nine other conveyances of rights-of-way and one other conveyance of a different sort are found in records of the Southern Pueblos Agency, which does not account for all the Pueblos. (J.A. 112-14, 188.) The first of these was approved in April 1926 and the last in December 1959. (J.A. 113-14, 188.) These rights-of-way covered "[r]oads, pipelines, power lines, ditches and canals, railroads, telephone and telegraph." (J.A. 114.) The

Pueblo of Santa Ana granted nine such rights-of-way, with high-level Department of the Interior approval, between April 1926 and March 1958. (J.A. 114-15, 128-87.)

The Dismissal of Mountain Bell from the Santa Ana Quiet Title Suit

In 1927, in accordance with Sections 1 and 3 of the Pueblo Lands Act, the United States filed suit in equity in the District Court for the District of New Mexico, on behalf of the Pueblo of Santa Ana, to quiet title to certain lands of the Pueblo including those crossed by Mountain Bell's right-of-way, naming Mountain Bell among others as a defendant. (J.A. 16-33.) Mountain Bell was served with process. (J.A. 71.) The United States asserted on behalf of the Pueblo that Mountain Bell and other defendants were trespassers and claimed interests in portions of Pueblo lands that constituted a cloud on the Pueblo's title. (J.A. 25-31.) The complaint requested the court to quiet title to the Pueblo's land and to enjoin the alleged trespasses. (J.A. 31-33.)

The 1928 right-of-way agreement was executed by the Pueblo and Mountain Bell and approved by Assistant Secretary Edwards while the quiet title suit was pending. The special assistant to the Attorney General who was handling the suit for the United States was apprised of the right-of-way agreement and undertook not to take a default judgment against Mountain Bell if its title were perfected by Interior Department approval of the right-of-way agreement. (J.A. 64-65.) On May 23, 1928, Mountain Bell informed the government attorney that the agreement had been approved in Washington and sent him copies of the approved agreement, expressing the understanding that the suit would be dismissed as against Mountain Bell. The company offered to sign a written stipulation if one was desired. (J.A. 66-67.) The United States promptly moved to dismiss Mountain Bell on the ground that it

now had good title to its right-of-way, ending any controversy between it and the Pueblo. (J.A. 36.)

The district court granted the motion and dismissed Mountain Bell as a defendant by an order dated May 31, 1928. The court recited that it appeared

"that since the institution of this suit [Mountain Bell] has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924" (J.A. 37.)

The Present Action

The Pueblo's current suit was brought in the District Court for the District of New Mexico in 1980, 52 years after the second, federally-approved, conveyance to Mountain Bell of its right-of-way and the dismissal of Mountain Bell from the quiet title suit. During that half century and more, the Pueblo gave no hint of dissatisfaction with the presence of Mountain Bell's poles on its land. It did not ask that they be removed or otherwise complain about them. (J.A. 52-53.) Indeed, by the time the suit was brought, the poles had been removed and Mountain Bell had professed its willingness to give up its right-of-way. (J.A. 54, 122-24.)

In its amended complaint the Pueblo, founding jurisdiction on 28 U.S.C. § 1362, alleged a trespass dating from 1905. It asked for an accounting of rents and profits for the period of allegedly unauthorized use of its land and for damages, both actual and punitive. It also asked, nominally, for an injunction against future use, in the absence of a continuing accounting, even though Mountain Bell's telephone poles had been removed. (J.A. 3-7.)

Mountain Bell filed a motion for partial summary judgment, seeking a ruling that, beginning at least with the second right-

of-way conveyance in 1928, it was on the Pueblo's land pursuant to a valid right-of-way and therefore was no trespasser. (J.A. 46-48.) In support of the motion Mountain Bell showed the 1928 conveyance, the history of administrative construction of Section 17, and the dismissal as to it of the Santa Ana Pueblo quiet title suit.

The district court denied Mountain Bell's motion and granted partial summary judgment to the Pueblo (covering the period since 1928) even though the Pueblo had not moved for summary judgment and Mountain Bell had stated affirmative defenses—laches and estoppel, among others—that were not in issue on its motion for summary judgment (J.A. 9-14). The court directed that the "Pueblo shall recover damages from April 18, 1928 to the date [Mountain Bell's] telephone and telegraph line was removed." (J.A. 94.) The Pueblo's prayer for \$500,000 in punitive damages was expressly denied. (*Id.*)

The district court ruled that Mountain Bell did not have a valid right-of-way and was therefore a trespasser on the theory that the Secretary of the Interior's approval of the right-of-way agreement was not enough to satisfy Section 17 of the Pueblo Lands Act. It further held that the 1928 dismissal of the quiet title suit against Mountain Bell on the Government's motion, reciting as the reason the newly-conveyed right-of-way, did not have res judicata effect. (J.A. 85-94.)

Mountain Bell asked for and obtained leave from the district court and the court of appeals to take an interlocutory appeal on the controlling issues of law, pursuant to 28 U.S.C. § 1292(b). (J.A. 94-96.) On the interlocutory appeal, the court of appeals affirmed, agreeing with the district court that under Section 17 of the Pueblo Lands Act no conveyance of any interest in land could be made by a Pueblo, even with the approval of the Secretary of the Interior, until Congress took further action. The court did not dispute Mountain Bell's showing that the Secretary had consistently construed the statute otherwise from the outset, but it rejected that administrative

construction as violative of the "plain congressional intent." The court of appeals also agreed with the district court that the order of dismissal of the quiet title suit did not have res judicata effect because the court thought that the order was without prejudice as a matter of law and therefore not a final judgment. (J.A. 96-108.)

SUMMARY OF ARGUMENT

Mountain Bell was entitled to summary judgment on its defense to the Pueblo's claim of trespass for the period between 1928 and 1980 on two separate grounds. First, during that period Mountain Bell's poles were on the Pueblo's land pursuant to a right-of-way freely conveyed by the Pueblo with the federal approval required by the applicable federal law. Second, Mountain Bell was dismissed by court decree in 1928 from a quiet title suit brought on behalf of the Pueblo, on the ground that Mountain Bell had a valid interest in the Pueblo's land, and the decree of dismissal operates to bar the Pueblo's trespass action regardless of whether the right-of-way in fact was valid.

I.

Section 17 of the Pueblo Lands Act, which in terms prohibits conveyances of Pueblo lands unless approved by the Secretary of the Interior, is most reasonably understood as authorizing such conveyances when the required Secretarial approval is obtained. This reading is the only one that satisfactorily harmonizes and gives effect to the two separate clauses of Section 17; it is, moreover, consistent with the legislative history and historical context of the Act and with the policy of the Indian laws generally. But even if it were not clearly the best interpretation, it is a reasonable interpretation that was adopted by the Secretary shortly after the Act was passed and has been consistently followed ever since. The court below erred in declining to defer to this reasonable contemporaneous con-

struction of the statute by the agency charged with administering it.

A. The court of appeals' interpretation of the first clause of Section 17 as prohibiting all conveyances of Pueblo land without further congressional action is unsatisfactory in numerous respects. Among other difficulties, it makes the second clause either inconsistent with the first or else a superfluous provision with no substantive effect. The better reading interprets the first clause as prohibiting only involuntary transfers of Pueblo land by acquisitions or initiations of adverse interests of the kind addressed, as to past transactions, elsewhere in the Act. This interpretation of the first clause makes it possible to give effect to the apparent intent of the second clause to permit continued consensual conveyances if approved by the Secretary of the Interior.

B.-C. This reading is also supported by the legislative history of the Act and by its historical and legal context. For many decades, the New Mexico Indian Pueblos had been believed not subject to the Indian laws generally and had freely conveyed their lands without governmental approval. Confusion about the extent of their rights to convey arose because of a change in judicial understanding as to the reach of the Indian laws. An interpretation of Section 17 as permitting conveyances by the Pueblo Indians with the Secretary's approval applies the general policy of the Indian laws to the Pueblos with due recognition of their historic freedom to convey. Conversely interpreting Section 17 to prohibit all conveyances of Pueblo lands would subject the Pueblos to a disability that there is no indication whatever that Congress intended to impose.

D. Under well-settled principles reaffirmed only recently by this Court, the Secretary's consistent 50-year construction of Section 17 as authorizing Pueblo land conveyances with his approval must be accepted by a reviewing court unless it is clearly wrong. Even if there were greater doubt than there is about the correctness of the Secretary's reading, it cannot

possibly be considered clearly wrong. The Secretary's interpretation is at least reasonable, and the court was therefore not free to substitute its own judgment, especially where to do so unsettles 50 years of land titles.

II.

The Pueblo's claim of title to the right-of-way that the court below has now upheld was submitted to a federal court in New Mexico by the United States, suing on behalf of the Pueblo, in an equity suit brought under the Pueblo Lands Act in 1927. That suit was dismissed as to Mountain Bell and its right-of-way on the motion of the United States in 1928 after the basis for the Pueblo's claim ostensibly had been removed by the 1928 right-of-way agreement between the Pueblo and Mountain Bell. The Court's order of dismissal recites that the right-of-way agreement gave Mountain Bell "good and sufficient title." Under principles of *res judicata*, the 1928 decree is a bar to the Pueblo's attempt to sue again on the same claim against Mountain Bell over 50 years later:

A. The court below erred in holding that the decree of dismissal was without prejudice, and therefore not final, based on the presumption of Fed. R. Civ. P. 41(a). In 1928, before Rule 41(a) was adopted, the opposite presumption was followed in federal equity courts, and an equity dismissal was presumed to be with prejudice unless otherwise expressly indicated. Moreover, the 1928 decree was expressly based on the plaintiffs' recital that the merits of the claim had been resolved, and it was therefore a binding renunciation of the plaintiffs' claim.

B. Application of *res judicata* based on the 1928 decree is also required by the intent of Congress in the Pueblo Lands Act, under which the suit was brought, and by the strong policies favoring finality of judgments in quiet title actions. The Pueblo Lands Act contemplated a single comprehensive final resolution of the unsettled claims to Pueblo lands that were to be the subject of quiet title suits authorized by the Act. Like-

wise, the policies of certainty and repose served by the doctrine of *res judicata* are, as this Court reaffirmed last year, "at their zenith" in real property cases. *Nevada v. United States*, 103 S.Ct. 2906, 2918 n.10 (1983). And it is manifestly unfair to require Mountain Bell to face a threat of trespass damages on a stale challenge to its title, believed to have been long since resolved, after it has for over 50 years, in reliance on the 1928 decree, forgone alternative methods of securing its right-of-way.

ARGUMENT

The decision below sanctions a repudiation by the Pueblo of Santa Ana of a right-of-way it granted in a 1928 agreement and honored without question for over 50 years. The court holds Mountain Bell liable for trespass damages on account of its 50 years of good faith unchallenged use of the right-of-way in reliance on the 1928 agreement. To reach this unfortunate result, the court both overturns a half century of consistent and reasonable administrative interpretation of the Pueblo Lands Act by the agency charged with its enforcement—an interpretation in which the Pueblo until lately concurred—and permits the Pueblo to assert this untimely claim notwithstanding the judicial dismissal, based on the 1928 agreement, of its prior quiet title and trespass suit against Mountain Bell presenting the same claim to the same right-of-way. The decision thereby undermines numerous New Mexico land titles derived from Pueblo Indian conveyances and contravenes the principles of certainty and predictability that are essential where title to real property is concerned.⁴

⁴ In December 1982, 16 lawsuits were filed by New Mexico Pueblos against holders of rights-of-way across Pueblo lands asking for repudiation of the rights-of-way. They are listed in an appendix to the petition for certiorari. (Pet. App. 40-42.)

In Part I below we demonstrate that the applicable statute, Section 17 of the Pueblo Lands Act, was satisfied when the Assistant Secretary of the Interior gave his approval to the right-of-way conveyance that the officials of the Santa Ana Pueblo voluntarily executed. For that conveyance the Pueblo received compensation from Mountain Bell that the federal official on the scene, well-versed in comparable transactions, thought more than fair. That the right-of-way could be granted with Interior's approval follows from the language of Section 17, from its history, from its context in the Pueblo Lands Act and the larger body of Indian law, and from the unique position of the Pueblos. Furthermore, Section 17 has been construed from the beginning to authorize such conveyances by the agency charged with administering it, and plainly the Interior Department's construction is "sufficiently reasonable" to be accepted by a reviewing court even if it were not the construction a court might have adopted had it been presented with the issue in the first instance. *Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981).

In Part II we show that the decree dismissing Mountain Bell as a defendant to the Santa Ana Pueblo quiet title suit in 1928 raises the bar of *res judicata* to this trespass action between the same parties, relating to the same land and the same line of telephone poles.

I. THE PUEBLO OF SANTA ANA CONVEYED TO MOUNTAIN BELL A RIGHT-OF-WAY FOR ITS TELEPHONE LINE ACROSS PUEBLO LAND, WHICH WAS MADE EFFECTIVE BY THE APPROVAL OF THE SECRETARY OF THE INTERIOR UNDER SECTION 17 OF THE PUEBLO LANDS ACT OF 1924; NO ADDITIONAL GOVERNMENTAL APPROVAL WAS REQUIRED.

The words, the history, and the context of Section 17 of the Pueblo Lands Act lead inexorably to the conclusion that a New

Mexico Indian Pueblo can convey an interest in its land if the Secretary of the Interior or his high-level delegate approves. Even if there were larger doubt on that score than there is, this Court would be bound to accept the consistent administrative construction of the statute as authorizing such conveyances, a construction that if not compelled by the terms of the statute at least is reasonably to be derived from its terms.

A. By Its Terms, Fairly Read, Section 17 Permits Consensual Transfers of New Mexico Indian Pueblo Lands if the Approval of the Secretary of the Interior Is Had.

There is no mistaking the meaning of the second clause of Section 17 of the Pueblo Lands Act. Standing by itself, it says:

"[N]o sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

The logical, indeed inescapable, implication is that a conveyance of land, or of some interest in land, by a New Mexico Indian Pueblo is valid in law and in equity if approved by the Secretary of the Interior. Although the court below did conclude that Section 17 is not an authorization to "the pueblos to grant their lands" (J.A. 103), that was not because of the negative terms in which the second clause is expressed but because of the court's mistaken view that the first clause of Section 17 also applies to consensual land transfers.

The first clause reads:

"No right, title or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of

New Mexico, or in any other manner except as may hereafter be provided by Congress, . . ."

There is a comma after the final word "Congress" in the first clause, and the two clauses are joined by "and." The first clause introduces an ambiguity, a "puzzle," as a lawyer intimately concerned with the meaning of the statute wrote early in 1926,⁵ giving rise to a need to construe the otherwise unambiguous second clause. Clearly the court of appeals is wrong in believing that, given the joinder of the two clauses by "and," there is no ambiguity in the section as a whole, and in saying that the statute

"means exactly what it says. No alienation of the Pueblo lands shall be made 'except as may hereafter be provided by Congress' and no such conveyance 'shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.'" (J.A. 103.) (Emphasis in original.)

Quite the contrary. As the Justice Department lawyer assigned to the Pueblos wrote, "At first reading the two halves of the section seem contradictory," one saying that title to Pueblo lands cannot be acquired except under subsequent legislation and the other that Pueblo lands may be conveyed at any time with the Secretary of the Interior's approval.⁶ Clearly the two clauses require harmonization.

⁵ A letter of February 27, 1926, to the Attorney General from George A.H. Fraser, Esq., a special assistant to the Attorney General working with the Pueblos in New Mexico, was proffered to the Court by the Pueblo as an appendix to its brief in opposition. The letter is a useful piece of evidence of the early construction of the statute, and for convenience we have reproduced it as an appendix to this Brief (pp. 1a-5a, *infra*). It contains Mr. Fraser's statement, partially quoted in the text, that § 17 "presents one of the numerous puzzles offered" by the Pueblo Lands Act (p. 3a, *infra*).

⁶ Fraser letter, n.5 *supra* (p. 3a, *infra*).

The Tenth Circuit's "means-what-it-says" view ignores any number of questions pertinent to harmonizing the two clauses:

Why, if both clauses are meant to apply to the same class of transactions, are they phrased so differently?

Why is only the second clause phrased in the traditional terms of grants and conveyances?

Why, indeed, if the two clauses impose conditions on the same class of transactions, did the legislative draftsman use two clauses instead of simply adding at the end of the first clause the phrase "and approved by the Secretary of the Interior"?

Why the pointed reference in the first clause, but not in the second, to acquiring title "by virtue of the laws of the State of New Mexico"?

Why, in the first clause, in contrast to the traditional conveyancing terms of the second, are the word "acquired" and the most unusual word "initiated" used to signify the restricted means of obtaining rights or title to or interests in Pueblo lands?

Why the meaningless gesture of saying that approval of the Secretary of the Interior was required if no conveyance would be effective in the absence of action by a subsequent Congress, which would not be bound by the 68th Congress' requirement of approval of conveyances by the Secretary?

The key to answering all these questions, which the court below did not ask, is that the two clauses do not apply to the same class of transactions. That they do not appears from the face of the statute.

The first clause deals specifically with the problem of claims against the Pueblos based on adverse possession under New Mexico law and with other means, such as condemnation, of divesting the Pueblos of their land without their consent. Claims to Pueblo land existing in 1924 by reason of past adverse

possession, under claim of right or otherwise, were to be recognized in the quiet title suits, as specifically allowed by Section 4 of the Act (Pet. App. 27-28). But that was an unusual act of grace, contrary to the usual rule that adverse possession is not good against the United States.⁷ Against that background, the first clause of Section 17 is understood as intended to preclude the growth of a new set of adverse claims — at least without Congress first having the chance to consider the matter. That is the only possible explanation for references in the first clause to "acquiring" or "initiating" land rights under the laws of New Mexico. The term "acquired" is appropriately used to indicate the acquisition of title by adverse possession or other nonconsensual means. *See, e.g.,* R. Powell & P. Ronan, *Powell on Real Property* ¶ 1012 [2], at 91 (1984 ed.). And the term "initiated" denotes a special way of beginning the process of acquiring title by possession — by filing and recording an affidavit with a New Mexico county official.⁸ Only the phrase

⁷ See *Hearings on S. 3865 and S. 4223 Before a Subcomm. of the Senate Comm. on Public Lands and Surveys*, 67th Cong., 4th Sess. 49-50, 60-62, 75 (1923) (hereinafter "1923 Senate Hearings"); *Hearings on H.R. 10452 and H.R. 10674 Before the House Comm. on Indian Affairs*, 67th Cong., 4th Sess. 145-46 (1923) (hereinafter "1923 House Hearings").

⁸ There was extensive testimony in the 1923 hearings regarding nonconsensual means of gaining title under New Mexico law. Witnesses testified, among other things, that under the laws of New Mexico, prior to 1889, one could "initiate" title in himself to a piece of property by filing and recording an affidavit with the appropriate county recorder. 1923 Senate Hearings 94; *see id.* at 80; 1923 House Hearings 59; N.M. Comp. L. 1897, § 3937 (statute of limitations begins to run in favor of one possessing property from the date of recording of affidavit).

Having initiated the title process by filing and recording under § 3937, one could acquire title by virtue of the New Mexico adverse possession statutes by possessing the land for 10 years, *see* N.M. Stat. Ann. § 3365 (1915); 1923 Senate Hearings 95-96, 224-25; 1923 House Hearings 55-61, 68, 89. New Mexico also recognized acquisition of title through 10 years' adverse possession of lands granted by the governments of Spain, Mexico, or the United States. N.M. Stat. Ann. § 3364 (1915); 1923 Senate Hearings 184-85; 1923 House Hearings 55-56.

"or in any other manner," after the reference to the laws of New Mexico, gives the slightest pause, and that phrase is fairly understood, according to conventional ejusdem generis rules, as encompassing other possible sources of authority for acquisitions of Pueblo land without Pueblo consent, such as federal condemnation law or laws allowing the Secretary of the Interior unilaterally to alienate Indian land interests (pp. 36-38, *infra*). The first clause is simply not written in such a way as to reach consensual conveyances.

On the other hand, the second clause deals naturally and comprehensibly with consensual conveyances. It uses the language of consensual conveyances—sale, grant, lease, conveyance. There is nothing in the joinder of the two clauses by the conjunction "and" that has the effect of making both of the clauses apply to the same class of transactions, as the court of appeals' opinion seems to suggest (J.A. 103). "And" serves just as well to join two clauses that, though broadly related, are independent and apply to different circumstances.

Although a court would be justified in straining to avoid the self-defeating construction of Section 17 that the Tenth Circuit adopted, no straining is necessary. The more rational construction flows comfortably from the statutory words. That conclusion was reached shortly after Section 17 was enacted by a dispassionate observer who lacked a brief-writer's spur of advocacy. George A.H. Fraser, Esq., the special assistant Attorney General who worked with the Pueblos in New Mexico for some years, after noting the first-blush inconsistency of the two clauses of Section 17 (p. 17 & n.5, *supra*), said:

"We concluded, however, that the two halves might be harmonized by construing the first to mean that no title could be adversely acquired except under subsequent acts of Congress, and the second to mean that the Pueblos might voluntarily convey, and that such conveyance would be good if approved by the Secretary." (Pp. 3a-4a, *infra*.)

He cautiously added that he did not think the construction "certain" but said that it "seems reasonable." (*Id.*) It is at least reasonable, on the statutory words alone. And, if some of the traditional aids to construction are considered, the proper interpretation of Section 17 becomes clear.

B. The History of the Pueblo Lands Act and the Context It Provides for Section 17 Confirm that Section 17 Permits Consensual Transfers of Pueblo Land with the Approval of the Secretary of the Interior.

The events that led to the crisis affecting the lands of the New Mexico Pueblos and thus to the enactment of the Pueblo Lands Act and Section 17 have been briefly recited in the Statement. Under Spanish and Mexican rule, Pueblo Indians had full title to their lands but were regarded as under a state of tutelage and could alienate their lands only under governmental supervision. *United States v. Candelaria*, 271 U.S. 432, 442 (1926). The original status of the Pueblos after the cession of New Mexico to the United States in 1848 is not clear. Felix Cohen wrote in his authoritative handbook that "[f]or many years after the accession of New Mexico the Pueblos were not considered Indian tribes within the meaning of existing statutes." F. Cohen, *Handbook of Federal Indian Law* 387 (1942). The tutelage of the United States as successor to Spain and Mexico was sometimes proffered, but the proffer was declined for the Pueblos by the Supreme Court of the Territory of New Mexico,⁹ whose views were seemingly confirmed by this Court in *United States v. Joseph*, 94 U.S. 614 (1876). The Court held in *Joseph* that, because of the Pueblos' "peaceable, industrious" character, and because their residents lived in "fixed communities, each having its own municipal or local government," the Pueblos were not within the class of Indians with whom a trust relationship with the United States existed under the 1834

⁹ *E.g.*, *United States v. Santistevan*, 1 N.M. 583 (1874); *United States v. Lucero*, 1 N.M. 422 (1869).

Non-Intercourse Act, as extended to the Indians of New Mexico in 1851, 9 Stat. 587. 94 U.S. at 619.

Though the Court would later ascribe what was said about the Pueblos in *Joseph* to inaccurate information,¹⁰ the *Joseph* decision effectively settled what all concerned took to be the governing law for nearly four decades. Under that law the Pueblos through their governors were free to transfer Pueblo land to others. With statehood for New Mexico, the express terms of the New Mexico Enabling Act, 36 Stat. 557, and this Court's repudiation of *Joseph* in *United States v. Sandoval*, 231 U.S. 28, 48-49 (1913), all that changed. (P. 5, *supra*.) Land titles obtained from the Pueblos were cast in doubt. Congress learned in the 1920's that there were 3,000 non-Pueblo claimants representing 12,000 family members within Pueblo grants, most of whom "had bought and possessed their lands in good faith" in reliance on the earlier court decisions. F. Cohen, *Handbook of Federal Indian Law* 389 (1942).

Congress was bound to act. It finally did so in 1924, when it enacted the Pueblo Lands Act.

Consideration of legislation to end the confusion over Pueblo land titles began in 1921.¹¹ The confusion, spawned immediately by *Sandoval's* disapproval of *Joseph* after nearly 40 years in which *Joseph* had been understood to state the law, had deeper roots in the anomalous legal position of the Pueblos, which was subject to varying degrees of uncertainty under the successively applicable laws of Spain, Mexico, and the United

¹⁰ *United States v. Sandoval*, 231 U.S. 28, 48 (1913).

¹¹ On June 1, 1921, Senator Bursum of New Mexico introduced S. 1938, 61 Cong. Rec. 1939 (1921), and on July 19, 1921, he introduced S. 2274, 61 Cong. Rec. 4031 (1921). At the request of Secretary of the Interior Fall, these bills were not acted upon. 1923 Senate Hearings 7, 31-32, 254.

States.¹² The early legislation introduced by a Senator from New Mexico foundered on opposition assertions that it was too heavily weighted in favor of the non-Indian land claimants.¹³ Other measures failed to win approval in 1923.¹⁴ It was not until 1924 that a consensus emerged and the Pueblo Lands Act was enacted.¹⁵ See F. Cohen, *Handbook of Federal Indian Law* 389-90 (1942).

¹² Under Spanish rule, the Pueblos were clearly able to convey land only with consent of the government. See *United States v. Candelaria*, 271 U.S. 432, 442 (1926), citing *Chouteau v. Molony*, 16 How. 203, 237 (1853). Whether they were similarly restricted under Mexican law is a matter of dispute. *Candelaria*, 271 U.S. at 442, citing *United States v. Pico*, 5 Wall. 536, 540 (1867), for the affirmative of the proposition; 1923 Senate Hearings 33. The United States guaranteed protection of the rights of Indians as they existed under Mexican law in the Treaty of Guadalupe Hidalgo.

¹³ Senator Bursum's S. 1938 provided that non-Indians could obtain title to lands within the exterior boundaries of Pueblo land grants through 10 years of actual, continuous, and adverse possession of lands not to exceed 160 acres in area. Such possession need not be under color of title. Secretary Fall's stated ground of opposition to this bill was that "it was the purpose of this Department to attempt to seek justice for all parties; that the passage of the Act in question would simply forestall a settlement based upon a full and comprehensive report of actual conditions; the legal status; the equitable rights and claims of both the Indians and others claiming rights, etc." 1923 Senate Hearings 31-32.

¹⁴ In the second session of the 67th Congress, four Pueblo lands bills were introduced. In the Senate, Senator Bursum introduced S. 3855 and Senator Jones of New Mexico introduced S. 4223. In the House, Representative Snyder introduced a slightly revised version of the Bursum bill, H.R. 10452, and Representative Leatherwood introduced H.R. 10674. These bills were the subjects of extensive hearings. 1923 Senate Hearings and 1923 House Hearings. All of the bills were extensively criticized in the hearings.

¹⁵ The Pueblo Land Act of 1924 that was passed and signed on June 7, 1924, was introduced in the 68th Congress as S. 2932, S. Rep. No. 492, 68th Cong., 1st Sess. 2-3 (1924); 65 Cong. Rec. 8445, 8448 (1924). It is in this bill that § 17 first appears. The bill was the result of a subcommittee's efforts to effect a compromise between the various differences of opinion. S. Rep. No. 492 at 6. There are no formal hearings or reports detailing the subcommittee's work.

Without special legislation, any lawsuit that might be brought to quiet titles to the Pueblo lands would be unsatisfactory because, in any such lawsuit, the settler-defendants could not assert against the United States, as guardian for a Pueblo, claims based on state statutes of limitation, adverse possession, or laches. 1923 Senate Hearings 49-50, 60-62, 75, 237-38; 1923 House Hearings 19, 145-46, 310. Thus, a critical provision of the statute was Section 4, which enabled the settlers in defending the quiet title suits authorized by the Act to make claims based on principles derived from New Mexico law governing the acquisition of rights to land by possession. *See generally* 1923 Senate Hearings 224-25.

Section 17 did not become a part of the statute until very late in its consideration.¹⁶ It is not a subject of the reported hearings or the committee reports. But the rationales for its two separate clauses appear clearly in the hearing testimony, which delved deeply into the status of the Pueblos and their lands.

So far as the first clause is concerned, the legislative record testifies abundantly to the difficulty Congress was having in establishing the machinery for resolving the conflicting claims based on the Indians' title, on the one side, and assertions of right coupled with long-term possession, resting on the laws of New Mexico, on the other.¹⁷ The last thing the Congress that enacted the Pueblo Lands Act would have wanted was that the same confusion should recur. That was reason enough for the mandate of the first clause of Section 17 that no new rights in lands confirmed to the Pueblos as a result of the procedures prescribed elsewhere in the Act could be "acquired or initiated by virtue" of New Mexico law "or in any other manner" unless Congress itself so provided. It was unspoken but implicit in the statute as illuminated by its history that one would be ill-

¹⁶ See note 15, *supra*.

¹⁷ See, e.g., 1923 Senate Hearings 49-52, 57-66, 79-81, 93-96, 104-05, 147-50, 221-26, 236-39; 1923 House Hearings 18-19, 25-27, 55-60.

advised to hold his breath waiting for the further congressional action that it would take to recognize new adverse acquisitions or initiations under New Mexico law.

As for the second clause, it would also help prevent future problems of the kind Congress was then wrestling with by giving fair warning that Pueblo land conveyances without the approval of the Secretary of the Interior were not valid. There is no indication, however, of any intent to prohibit consensual conveyances altogether. The members of the cognizant congressional committees were fully informed at the hearings of the status that the Pueblos enjoyed. The legislators were told that, until *Sandoval* was decided, everyone understood that the Pueblos could alienate their lands without governmental approval,¹⁸ and that it was uncertain even after *Sandoval* what government approval was necessary in the case of Pueblo land transactions.¹⁹ Legislators who were prominent in the enactment of Section 17 seemed to understand from the hearings that a provision for alienation with the approval of the Secretary of the Interior would be permissible and desirable and would in fact maintain the status quo.²⁰ No one suggested that

¹⁸ S. Rep. No. 492, n. 15 *supra*, at 5; 1923 Senate Hearings 50-51, 54, 57, 62, 71, 209; 1923 House Hearings 17, 26, 40. Similarly, the legislators heard that, despite the communal nature of Pueblo life, Pueblo Indians could own land in severalty and, within narrow family limits, alienate it with the consent of the Pueblo. 1923 Senate Hearings 229-30, 247; 1923 House Hearings 322. The second clause of § 17 includes a provision for a conveyance of his land by "any Pueblo Indian living in a community of Pueblo Indians" with the approval of the Secretary of the Interior, presumably to ensure that, whatever the individual Indians could do consistent with Pueblo law and custom before *Sandoval*, they could continue to do if they obtained the Secretary's approval.

¹⁹ 1923 Senate Hearings 72-73, 154-55; 1923 House Hearings 40-41.

²⁰ 1923 Senate Hearings 72-73, 154-55; 1923 House Hearings 41. The House Committee report quoted by the court below (J.A. 103) indicates only a belief on the part of the committee that some federal approval was necessary to make the Pueblos "competent" to convey lands, as they had been assumed to be—without federal approval—before the *Sandoval* decision. H.R. Rep. No. 787, 68th Cong., 1st Sess. 2 (1924).

since *Sandoval* the Pueblos had become so constrained in dealing with their land, which theretofore had been solely theirs to deal with, that they now required explicit congressional sanction for all their conveyances—much less that in the future they *should be* subject to such an awkward and cumbersome requirement as a matter of deliberate congressional policy.

Thus, the legislative history confirms the dichotomy between the two clauses of Section 17.

C. Section 17, Construed as Requiring Approval by the Secretary of the Interior of Conveyances of Interests in Land by the Pueblos, Fits Squarely in the Tradition of Federal Indian Law.

The court of appeals opened its analysis of the meaning of Section 17 with the statement that it seemed clear “that if § 17 is not a delegation of power, the 1928 agreement [between the Pueblo and Mountain Bell conveying the right-of-way at issue] is void.” (J.A. 103.) If the court means to say that Congress must delegate to the Pueblos power to alienate their land, the statement reflects an utterly mistaken view of federal Indian law.

Felix Cohen spoke with deliberate emphasis (the more emphatic for his rare use of italics) when he wrote in his handbook:

“Perhaps the most basic principle of all Indian law . . . is the principle that *those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*” F. Cohen, *Handbook of Federal Indian Law* 122 (1942).

The foundation case for the proposition stated by Cohen is the opinion of the Great Chief Justice in *Mitchel v. United States*, 9

Pet. 711, 736-60 (1835). The proposition is stated or reflected in numerous other decisions of this Court.²¹

The question under Section 17, thus, is not whether some power of alienation has been granted to the Pueblos but the extent of the restriction on an existing power that Congress has effected. That is particularly so because Section 17 deals with Indian communities long believed, under *Joseph*, not to be subject to any restrictions on their sovereign power to alienate lands they held in fee simple.

The basic restriction on Indian power to alienate land is found in the Non-Intercourse Act of 1834, now codified as 25 U.S.C. § 177, the successor to a line of temporary and permanent non-intercourse acts, the first of which was enacted in 1790.²² In its present codified form, the Non-Intercourse Act reads:

“No purchase, grant, lease, or other conveyance of land, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.” 25 U.S.C. § 177.

The court below indicated that, in enacting Section 17, Congress meant to apply the Non-Intercourse Act to the Pueblos. (J.A. 100-02.) It is more accurate to say that Section 17 was meant to apply to the Pueblos the policy expressed in the Non-Intercourse Act of requiring some sort of federal approval for

²¹ See *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978); *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 198 (1978); *McClanahan v. Arizona State Tax Comm'r*, 411 U.S. 164, 172-73 (1973); *Talton v. Mayes*, 163 U.S. 376, 384 (1896); *Worcester v. Georgia*, 6 Pet. 515, 559 (1832).

²² Act of July 22, 1790, 1 Stat. 137. Four other non-intercourse acts preceded the 1834 Act: Act of March 1, 1793, 1 Stat. 329; Act of May 19, 1796, 1 Stat. 469; Act of March 3, 1799, 1 Stat. 743; Act of March 30, 1802, 2 Stat. 139.

Indian transfers of land. By 1924, the Non-Intercourse Act was, and for some decades it had been, an anachronism in its literal terms. Since 1871 it has been impossible to satisfy literally the Non-Intercourse Act's explicit condition on the validity of Indian conveyances—that they be made by treaty; in that year Congress renounced the making of treaties as a way of dealing with the Indians, 16 Stat. 566, 25 U.S.C. § 71, and no treaties have been made with Indians since then.

The respondent Pueblo of Santa Ana in its brief in opposition to the petition for certiorari attributes what we know as Section 17 of the Pueblo Lands Act to a lawyer for the Pueblos, Francis Wilson, Esq. In December 1923 Wilson wrote to the Commissioner of Indian Affairs referring to Section 17 of "the [unspecified] Bill" (which may or may not be the Section 17 ultimately enacted). He said that this Section 17 was "intended to cover the same ground as" the Non-Intercourse Act (referring to that act by its Revised Statutes section number) "but it is changed so as to accord with the conditions of the Pueblo Indians." (Br. in Opp. App. 12.)

If Mr. Wilson was indeed referring to the Section 17 that was to be enacted as part of the Pueblo Lands Act in 1924, then a comparison of Section 17 with the Non-Intercourse Act shows that the "ground" of the Non-Intercourse Act is covered by the second clause of Section 17 and not the first. It is the second clause that in its form, structure, and language traces the Non-Intercourse Act—changed to accord with the conditions of the Pueblos by requiring the approval of the Secretary of the Interior for voluntary conveyances of land and by not imposing a condition on such conveyances that could not literally be satisfied. Consider:

"No *purchase*, grant, lease or other conveyance of lands, or of any title or claim thereto, *from any Indian nation or tribe of Indians*, shall be of any validity in law or equity, unless the same be *made by treaty or convention entered into pursuant to the Constitution*. . . ." Non-Intercourse Act, 25 U.S.C. § 177.

"[N]o *sale*, grant, lease of any character or other conveyance of lands, or any title or claim thereto, *made by any Pueblo as a community or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico* shall be of any validity in law or in equity unless the same be *first approved by the Secretary of the Interior*." Pueblo Lands Act § 17.

The parallel is obvious. "*Sale*" is used in Section 17 instead of "*purchase*" because "*purchase*" was specially defined for purposes of the Pueblo Land Act by Section 11 of the Act (Pet. App. 33) to refer to purchases by the Pueblos. That change required in turn that "*from any Indian nation . . .*" in the Non-Intercourse Act be changed to "*by any Pueblo . . .*" in Section 17. When "*first approved by the Secretary of the Interior*" in Section 17 is recognized as the equivalent of "*made by treaty or convention entered into pursuant to the Constitution*" in the Non-Intercourse Act, *i.e.*, as the necessary condition for making conveyances under either statute valid in law or equity, the parallel between the Non-Intercourse Act and the second clause of Section 17 of the Pueblo Lands Act is seen to be complete.

It follows from this textual incorporation of the Non-Intercourse Act in the second provision of Section 17 that Congress meant the second clause as its expression of the policy of the Non-Intercourse Act in application to the Pueblos. The first sentence, on the other hand, says nothing on the subject of the Non-Intercourse Act, namely purchases (or, looked at from the

other direction, sales), grants, leases, and other conveyances of land. It speaks of interests being acquired or initiated under New Mexico law—an obvious reference, as we have seen, to gaining interests in Pueblo land against the Pueblos' wishes or without their consent.

Moreover, the Section 17 requirement of approval of the Secretary of the Interior—or, in some earlier versions, the President—is a commonplace in statutes²³ and treaties²⁴ that

²³ *E.g.*, 25 U.S.C. § 397 (originally enacted as Act of Feb. 28, 1891, ch. 383, § 3, 26 Stat. 795) (5 year leases for grazing or 10 year leases for mining purposes by tribal council with Secretary's approval); 25 U.S.C. § 415, 416 (originally enacted as Act of Aug. 9, 1955, ch. 615, § 1, 69 Stat. 539) (leases of restricted Indian lands for various purposes by owner with Secretary's approval); 25 U.S.C. § 409 (originally enacted as Act of June 21, 1906, ch. 3504, 34 Stat. 327) (sales and conveyances of allotted lands within reclamation projects by Indians under rules prescribed by Secretary); 25 U.S.C. § 396 (Act of Mar. 3, 1909, ch. 263, 35 Stat. 783) (leases of allotted lands for mining purposes by allottee for term and under rules prescribed by Secretary); 25 U.S.C. § 393a (Act of Feb. 11, 1936, ch. 50, 49 Stat. 1135) (5 year leases for farming and grazing purposes of restricted lands of Five Civilized Tribes of Oklahoma by owner with approval of Five Civilized Tribe Agency official only under rules prescribed by Secretary); 25 U.S.C. § 393 (Act of March 3, 1921, ch. 119, § 1, 41 Stat. 1232) (lease of restricted allotment of any Indian for farming and grazing purposes by allottee or heirs with consent of reservation official and under rules prescribed by Secretary); 25 U.S.C. § 392 (Act of Sept. 21, 1922, c. 367, § 6, 42 Stat. 995) (any form of conveyance of lands allotted under law or treaty that forbids alienation without approval of President of United States may be approved by Secretary); 25 U.S.C. § 403 (Act of June 25, 1910, ch. 431, § 4, 36 Stat. 356) (Indian allotment held under trust patent may be leased by allottee for 5 years under rules prescribed by Secretary); 25 U.S.C. § 406 (Act of June 25, 1910, ch. 431, § 8, 36 Stat. 857) (timber on Indian lands held under trust may be sold by owner with consent of Secretary); 25 U.S.C. § 407 (Act of June 25, 1910, ch. 431, § 7, 36 Stat. 857) (sales of timber or unallotted lands under regulations prescribed by Secretary); Act of July 2, 1945, 59 Stat. 313 (conveyances by members of Five Civilized Tribes valid after enactment date with consent of Secretary); Act of Feb. 27, 1925, § 3, 43 Stat. 1008 (trust lands of Osage Indians may be sold by legal guardians with consent of Secretary).

²⁴ *E.g.*, Treaty with the Delawares, Oct. 3, 1818, 7 Stat. 188, C. Kappler,

authorize the alienation of Indian land. In adapting the terms of the Non-Intercourse Act to "accord with the conditions of the Pueblo Indians," Congress was breaking no new ground but acting squarely in the tradition of federal Indian law.

In *Pickering v. Lomax*, 145 U.S. 310 (1892), this Court held valid a deed granted pursuant to a treaty provision nearly identical to the second clause of Section 17. The treaty provided:

"The tracts of land herein stipulated to be granted, shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the President of the United States." 145 U.S. at 311.

The Court said:

"The object of the provision was not to prevent the alienation of lands *in toto*, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the President, before affixing his approval, satisfy himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained." 145 U.S. at 316; *see also Lomax v. Pickering*, 173 U.S. 26 (1899); *Smith v. Stevens*, 10 Wall. 321 (1870).

Indian Affairs Laws and Treaties (hereinafter cited as "I.A.L.T.") Vol. II p. 171 (grants to specific individuals not to be conveyed without consent of President); Treaty with the Chickasaw, May 24, 1834, 7 Stat. 450, I.A.L.T. Vol. II pp. 418-19 (reservation lands may be sold, leased, or disposed of upon consent of two tribal agents and President); Treaty with the Potawatomi, Oct. 2, 1818, I.A.L.T. Vol. II p. 168 (grants to specific individuals not to be conveyed without consent of President); Treaty with the Cherokee, July 19, 1866, 14 Stat. 799, I.A.L.T. Vol. II p. 946 (lands granted for missionary or educational purposes not to be sold without consent of Cherokee national Council and Secretary); *id.*, I.A.L.T. Vol. II p. 948 (any lands owned by Cherokees in Arkansas and in states east of the Mississippi may be sold by Cherokee Nation in manner prescribed by Cherokee national council and with consent of Secretary).

The court below invoked a canon that statutes passed for the benefit of Indians "are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). (J.A. 104.) The principle is unexceptionable. But here, if there were doubt about Congress' expression—as there should not be—the resolution of the doubt that would favor the proud Pueblo communities, accustomed to managing their own affairs, is the construction of the statute that both they and their guardians from the Bureau of Indian Affairs adopted and acted upon soon after the statute was enacted. That construction allows a Pueblo's governors to continue to make conveyances of the Pueblo lands subject only to the approval of the Cabinet officer responsible for their welfare. It does not stultify them by preventing them from engaging in any land transactions at all without a full exertion of the national legislative power by House, Senate, and President. In any event, the principle of construction stated by the court of appeals does not permit a court to ignore the clear wording of a treaty, agreement, or enactment or to disregard the intent of Congress. *Rice v. Rehner*, 103 S.Ct. 3291, 3302 (1983).

Furthermore, another governing principle, ignored below, is that Indian statutes "must be read in light of common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). So read, Section 17 is clear in its meaning.

D. Even if There Were More Doubt than There Is About the Meaning of Section 17, Deference Would Have to Be Given to the Consistent Administrative Construction that It Authorizes Voluntary Conveyances by the Pueblos with the Approval of the Secretary of the Interior.

Last term this Court reminded the courts of appeals and district courts, as it often has in recent years, that they are not to disregard the consistent construction by an agency of a

statute it administers merely because a court would construe the statute differently if the question were posed to it in the first instance. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S.Ct. 2778 (1984). The Court said that, of course, "[i]f the intent of Congress is clear, that is the end of the matter" *Id.* at 2782. But, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 2782. Or, as the Court has put it on other occasions, when a statute is ambiguous, the question is whether the agency has adopted a "sufficiently reasonable" construction.²⁵

In this case the court below did not question the proposition that the Interior Department has consistently construed Section 17, from very soon after it was enacted, as permitting the New Mexico Pueblos to make volitional conveyances of interests in their lands if the Secretary of the Interior approves. The court could not rationally question the fact of the agency construction. Sixty instances of approvals by the Secretary of rights-of-way and other interests in Pueblo lands were adduced from the records of one Pueblo agency; nine of these involved the Pueblo of Santa Ana itself. (Pp. 7–8 *supra*.) Santa Ana has attempted to minimize the significance of these instances of agency action on the ground that they are heavily (though not exclusively) concentrated in the early years after the statute was enacted. But that is no ground for minimization. On the contrary, an agency interpretation adopted close to the time of enactment is most likely to reflect the true congressional intent. That Section 17 came to be invoked less often as time

²⁵ *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978); *Udall v. Tallman*, 380 U.S. 1, 18 (1965); *see also* *E.I. Du Pont de Nemours & Co. v. Collins*, 432 U.S. 46, 54–55 (1977); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 121–22 (1973); *Zemel v. Rusk*, 381 U.S. 1, 11 (1965); *La Roque v. United States*, 239 U.S. 62, 64 (1915).

passed is solely attributable to the fact that, beginning in 1926, statutes providing other means of obtaining rights-of-way across Pueblo lands were enacted. (P. 37, *infra*.)

There is no doubt that the Department has consistently maintained its view of the meaning of the statute. Felix Cohen, writing with his own scholarly authority and under the Department's auspices, states flatly in his handbook that Section 17 "laid down an absolute rule that no . . . transfer [of land or interests in land by Pueblo authorities or individual Pueblo Indians] should be of any validity in the future unless approved in advance by the Secretary of the Interior," F. Cohen, *Handbook of Federal Indian Law* 390 (1942), and that "section 17 of the Pueblo Lands Act . . . bars transfer of pueblo land not approved in advance by the Secretary of the Interior," *id.* at 392. See also *id.* at 104 & n.195, 327, 395-96. None of Cohen's cited references to Section 17 suggests that the statute's first clause is applicable to consensual transfers of interests in land, or that consensual transfers are forbidden even if the Secretary has approved them. See also United States Department of the Interior, *Federal Indian Law* 692 n.28 (1958); *The Legal Status of the Indian Pueblos of New Mexico and Arizona*, 57 I.D. 36, 49 (1939).

The court of appeals denied the consistent administrative construction its proper deference on the sole ground that Section 17 is unambiguous and the Interior Department's construction violates "the plain congressional intent" of the section. (J.A. 105.) For all the reasons stated in preceding sections of this Brief, the words of the statute plainly bear the Interior Department's construction and perhaps compel it. At the very worst, Section 17 is ambiguous. The court of appeals therefore had no justification for ignoring the administrative construction.

The Pueblo has attempted to suggest that the Department's construction of Section 17 was a contrivance, master-minded by a Chicago bond lawyer and designed solely to benefit a small

railroad that was ailing and might be doomed if it lost its Pueblo rights-of-way. (Br. in Opp. 9-10.) The letter to the Attorney General from Mr. Fraser, the Justice Department attorney who was on hand in New Mexico to protect the interest of the Pueblos, which the Pueblo has offered to show that the agency construction was such a contrivance, shows no such thing. We have quoted from the letter at previous points in our argument (pp. 17, 20-21, *supra*). What the letter (pp. 1a-5a, *infra*) shows is responsible people, including the special counsel to the Pueblos, working out a problem with the help of a recently enacted statute with whose background they were intimately familiar—precisely the kind of circumstance that this Court has said gives particular weight to an agency interpretation adopted when a statute is new on the books. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 409-10 (1975); *Udall v. Tallman*, 380 U.S. 1, 18 (1965); *Power Reactor Development Co. v. International Union of Electrical Radio & Machine Workers*, 367 U.S. 396, 408 (1961); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933).

The incident of the small railroad and its rights-of-way described in the Fraser letter also points up sharply the difference between the first and second clauses of Section 17 and the governmental undertaking to harmonize its two clauses, which at first reading appear "contradictory" (p. 17, *supra*).²⁶ In July 1924, a month after the passage of the Pueblo Lands Act, the Secretary of the Interior purported to grant a right-of-way to a railroad across Pueblo lands under the general right-of-way statutes then in effect, which did not require Pueblo consent to the grant. 30 Stat. 990, 25 U.S.C. §§ 312-18. In 1925, the

²⁶ The following paragraphs are based on the Fraser letter and on hearings and reports on 1976 legislation, 90 Stat. 1275, that repealed the 1926 condemnation statute mentioned in the text. *Hearings on S. 217 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 2-5 (1975); S. Rep. No. 94-148, 94th Cong., 1st Sess. 2-3 (1975); H.R. Rep. No. 94-800, 94th Cong., 2d Sess. 2-3 (1976).

Pueblo Lands Board informed the Secretary that, in its opinion, those right-of-way statutes did not apply to the Pueblos. Thereafter, representatives of the Department of the Interior, the Pueblos, and those seeking rights-of-way across Pueblo lands met in Chicago. Mr. Fraser wrote after the meeting:

"It was the general sense of all present that while the Pueblos should be protected in every way, their peculiar status ought not to put them in a more favored position than other Indians . . . so as to be able to prevent railroads, telegraph and telephone and power lines, etc. from crossing their grants." (Pp. 2a-3a, *infra*.)

Section 17 suggested itself as a way of validating the railroad's rights-of-way. According to Mr. Fraser Section 17 presented "one of the numerous puzzles offered by the Act." But, as we have seen (p. 21, *supra*), he concluded that to construe Section 17 to allow voluntary conveyances of rights-of-way by the Pueblos with the approval of the Secretary of the Interior was "reasonable."²⁷

Thereafter, the Pueblos of Santa Ana and Zia executed right-of-way deeds to the railroad that were approved by the Secretary. But the Pueblo of Jemez did not, apparently because the railroad's right-of-way bordered some of the Pueblo's sacred springs. Jemez was of course under no obligation to convey the right-of-way under the second clause of Section 17. The Secre-

²⁷ Mr. Fraser came to assert this "reasonable" construction of § 17 quite positively as the correct construction. On January 4, 1927, Mr. Fraser wrote to Mountain Bell attorneys and inquired about their intentions regarding a right-of-way across the lands of the Pueblo of Taos. In that letter, Mr. Fraser referred to the condemnation legislation enacted in 1926 (p. 37, *infra*) and concluded by stating, "The Pueblo Lands Act of June 7, 1924 . . . also provides in section 17 a method whereby titles may be procured from the Pueblo Indians with the assent of the Secretary of the Interior. In my judgment these are the only two ways whereby a good title can now be obtained." (The Fraser letter of January 4, 1927, was appended to petitioner's brief in reply to the brief in opposition and has been reproduced in the appendix to this Brief (pp. 6a-7a, *infra*) for the Court's convenience.)

tary had no authority to convey a right-of-way on his own. An involuntary transfer could be had under the first clause of Section 17 only if Congress took further action. Rather than authorize the Secretary to grant the right-of-way, Congress in 1926 passed legislation authorizing the condemnation of rights-of-way over Pueblo lands. 44 Stat. 498. See H.R. Rep. No. 955, 69th Cong., 1st Sess. (1926).

The railroad then brought a condemnation suit against the Pueblo of Jemez, but a court held that the United States was a necessary party and had not consented to be sued so that relief could not be had.²⁸ To remedy the situation, Congress in 1928 passed the Act of April 21, 1928, 45 Stat. 442, now 25 U.S.C. § 233. The 1928 Act for the first time extended to the lands of the New Mexico Pueblos the provisions of general Indian land right-of-way authorization statutes, which at that time allowed the Secretary of the Interior to make grants of rights-of-way without the consent of the affected Indian community. See H.R. Rep. No. 816, 70th Cong., 1st Sess. (1928); S. Rep. No. 799, 70th Cong., 1st Sess. (1928).

The Department of the Interior nevertheless continued to act under Section 17, approving consensual grants of rights-of-way by the Pueblos after 1928, even though, between 1928 and 1948, the Secretary of the Interior could grant a right-of-way on his own authority.²⁹ This long-standing and unwavering

²⁸ See *Plains Electric Generation and Transmission Cooperative, Inc. v. Pueblo of Laguna*, 542 F.2d 1375, 1377 (10th Cir. 1976).

²⁹ The Department of the Interior did not employ this procedure only in the case of the Pueblos but viewed it as a means of granting rights-of-way across lands of any tribe. In introducing legislation that became the 1948 General Purpose Rights-of-Way Act, now 25 U.S.C. §§ 323-328, which required tribal consent, the Under Secretary of the Interior wrote to the President pro tempore of the Senate:

"When it is discovered that an application for a right-of-way may not be granted under existing statutory authority, which is often

adherence by the Interior Department, the agency charged with the administration of the Pueblo Lands Act, to the construction of Section 17 that was agreed on in 1926 is entitled to great deference. *United States v. Clark*, 454 U.S. 555, 565 (1982); see also *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 42 n.27 (1977). The court below ignored the fact that agency officials carrying out statutory commands have a better view of the statutory mandate than a reviewing court many years later—especially when, as here, the agency officials participated in the legislative process and when the first judicial decision comes 60 years after the statute was enacted. See *Power Reactor Development Co. v. International Union of Electrical Radio & Machine Workers*, 367 U.S. 396, 408 (1961); see also *United States v. Vogel Fertilizer Co.*, 445 U.S. 16, 31 (1982).

The passage of 60 years adds weight to the demand for deference to the agency practice in another way in this case. We deal here with land titles. Mountain Bell and other grantees of rights-of-way across Pueblo lands have relied on the agency construction in making use of their rights-of-way. Investments have been made on the strength of the agency's construction. The stability of the land titles that underlie the investments is in itself an important consideration. See *Minnesota Co. v. National Co.*, 3 Wall. 332, 334 (1865); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486-87 (1924); see also *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978); *McLaren v. Fleischer*, 256 U.S. 477, 481 (1921).

the case, the right must then be obtained by means of easement deeds executed by the Indian owners and approved by the Secretary of the Interior." S. Rep. No. 823, 80th Cong., 2d Sess. 3-4 (1948).

Thus, the administrative practice in the case of the Pueblos was comparable to that applicable to other tribes.

II. THIS SUIT IS BARRED BY A PRIOR ADJUDICATION OF MOUNTAIN BELL'S TITLE TO THE DISPUTED RIGHT-OF-WAY IN A SUIT BETWEEN THE SAME PARTIES.

The Pueblo of Santa Ana's claim in this case is that Mountain Bell has no title to the right-of-way in dispute and that its use of the right-of-way therefore is and has been since 1905 a continuing trespass. The same claim against Mountain Bell was stated in the quiet title suit brought by the United States on behalf of the Pueblo in 1927. *United States of America as Guardian of the Pueblo of Santa Ana v. Brown*, No. 1814 Equity (D.N.M.). Like the present suit, the *Brown* complaint both alleged that Mountain Bell lacked title to the right-of-way and sought on that ground to enjoin further use of the right-of-way as a continuing trespass. (J.A. 29, 33.) The district court dismissed that claim as to Mountain Bell on the ground that Mountain Bell had acquired a new and valid title to the right-of-way in its agreement of February 23, 1928, with the Pueblo. (J.A. 37.)

The decree of dismissal in *Brown* is a complete bar to the Pueblo's complaint in this case for the years that have passed since it was entered on May 31, 1928. As to those years the present complaint is an attempt to assert, in a suit between the same parties, the very claim of Pueblo title that was rejected when the court in *Brown* dismissed Mountain Bell as a defendant on the ground that its competing claim of title was good.³⁰

³⁰ The fact that in *Brown* the Pueblo was represented by the United States does not alter the res judicata effect of the decree on subsequent litigation brought by the Pueblo in its own name. In *Nevada v. United States*, 103 S.Ct. 2906, 2921 (1983), this Court held that res judicata applies when an Indian

Under well-settled law, a prior final judgment on the same claim between the same parties is *res judicata* and cannot be relitigated in a later suit. *Nevada v. United States*, 103 S.Ct. 2906, 2918 (1983).

A. The Court Below Erred in Holding that the Brown Decree Was Not Final.

The court of appeals held that the *Brown* order of dismissal was not a final judgment, and therefore was not entitled to *res judicata* effect, because the decree "failed to state whether it was with or without prejudice, and it was, therefore without prejudice." (J.A. 105-06.)³¹ That holding is in error. Under the equity rule that prevailed in 1928, such a decree was a dismissal with prejudice.

1. In 1928 the Dismissal of a Bill in Equity Was Presumed to Be on the Merits, and with Prejudice, Unless Otherwise Stated.

The court below relied on the presumption of Rule 41(a), Fed. R. Civ. P., that a dismissal is without prejudice unless otherwise stated. Although the Federal Rules were not in force at the time of the *Brown* decree, the court of appeals believed that Rule 41(a) reflected "long established practice in federal courts," citing a dictum in *Home Owners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir. 1943). (J.A. 106.)³²

tribe has been represented in a prior action by the United States, without regard to whether the tribe was a party or had an opportunity to intervene.

³¹ The court also concluded that the decree could not be viewed as a consent decree (to which no such presumption that it was without prejudice would attach) on the ground that it "indicates neither the court's consideration nor approval of the agreement." (J.A. 106.)

³² The Federal Rules of Civil Procedure took effect on September 1, 1938. Fed. R. Civ. P. 86. Prior to their adoption, the Conformity Act of June 1, 1872, c. 255, § 5, 17 Stat. 197, repealed by the Act of June 25, 1948, c. 646, § 39, 62 Stat. 992, required the federal courts in actions at law to apply the nonsuit rule of the state in which they sat. *Barrett v. Virginian Ry.*, 250 U.S. 473,

In fact, however, the *Huffman* dictum relied on by the court below was not addressed to the Rule's presumption as to the effect of a dismissal. It referred to the prior practice governing the circumstances in which a voluntary dismissal was permitted. In federal equity courts, the general rule was just the reverse of the Rule 41(a) presumption. A general dismissal in equity was presumed to be *with* prejudice unless the decree expressly stated otherwise:

"A general decree of dismissal of a suit in equity, without more, renders all the issues in the case *res judicata*, and constitutes a bar to an action at law for the same cause. Hence, when a court of equity has no jurisdiction of a suit, the decree of dismissal must expressly adjudge that it is rendered for that reason, or must expressly provide that it is made without prejudice, to the end that the complainant may resort to his action at law" *Indian Land & Trust Co. v. Shoenfelt*, 135 F. 484, 487 (8th Cir. 1905).

As Justice Field wrote for this Court in *Durant v. Essex Co.*, 7 Wall. 107 (1868):

"The decree dismissing the bill in the former suit in the Circuit Court of the United States being absolute in its terms, was an adjudication of the merits of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties. A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complainant has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without preju-

475-76 (1919). In equity cases, however, the federal courts were free to adopt their own procedures, drawing "just analogies" from English chancery practice. *Lindley v. Denver*, 259 F. 83, 85 (6th Cir. 1919); *Individual Drinking Cup Co. v. Union News Co.*, 250 F. 625, 626 (2d Cir. 1918). Rule 41, which superseded the widely varying practices in the different states and established a uniform practice, was not retroactive. 2B W. Barron & A. Holtzoff, *Federal Practice and Procedure* § 915, at 128 (1961 ed.).

dice," or other terms indicating a right or privilege to take further legal proceedings on the same subject, do not accompany the decree, it is presumed to be rendered on the merits." *Id.* at 109 (emphasis added).³³

Brown was a suit in equity. The decree dismissing Mountain Bell as a defendant in the *Brown* suit makes no recital that it is "without prejudice" and no suggestion that a "right or privilege to take further legal proceedings" is reserved. Under the prevailing equity rule, this was a dismissal with prejudice, and the decree was therefore a final judgment precluding any later litigation of the claim between the same parties.

2. *The Dismissal Was with Prejudice for the Further Reason that It Was Expressly Based on a Resolution of the Underlying Dispute.*

The *Brown* decree not only lacks any recital that it is based on a reason other than the merits; it affirmatively recites that the suit was being dismissed because Mountain Bell had "secured good and sufficient title to the right-of-way and premises in controversy" (J.A. 37), thus extinguishing the plaintiffs' claim on the merits. Under this Court's decision in *United States v. Parker*, 120 U.S. 89 (1887), a dismissal thus predicated on a resolution of the subject matter of the suit is a dismissal with prejudice, even in an action at law.

³³ *Accord*, *Lyon v. Perin & Gaff Mfg. Co.*, 125 U.S. 698, 702 (1888); *House v. Mullen*, 22 Wall. 42, 46 (1874); *Walden v. Bodley*, 14 Pet. 156, 161 (1840); *Scott v. First Nat'l Bank of Morris*, 285 F. 832, 835 (8th Cir. 1922); *Carlisle v. Smith*, 224 F. 231, 234 (N.D. Ga. 1915), *decree rev'd on other grounds*, 228 F. 666 (5th Cir. 1916) ("If [the plaintiff] simply dismisses, without expressing in his order of dismissal that it is without prejudice, the case will be held to have been determined on the merits"). The same rule was applied in state courts. *E.g.*, *Newton v. Kemper*, 66 S.E. 102, 103 (W. Va. 1909); *Stickney v. Goudy*, 23 N.E. 1034, 1035 (Ill. 1890); *Martin v. Evans*, 36 A. 258, 259 (Md. App. 1897) (unqualified decree of dismissal "is presumed to be an adjudication on the merits adversely to the complainant, and constitutes a bar to further litigation of the same matters between the parties").

In *Parker*, the United States was held barred by res judicata from prosecuting a second action against a surety for reimbursement of monies not properly accounted for by a bonded public official. A prior action to collect on the same bond had been dismissed with the consent of the United States attorney upon presentation to the court of a statement of the official's accounts showing that the accounts in dispute "had been settled and adjusted" between the United States and the bonded official. The judgment of dismissal likewise recited "that the subject matter in this suit has been adjusted and settled by the proper parties in Washington" *Id.* at 91. The United States attempted to bring the second action against the surety after a subsequent audit disclosed that additional amounts were in fact unaccounted for.

On these facts, this Court squarely rejected the United States' claim that the dismissal of the first suit was only a nonsuit and therefore not a final judgment. The Court held on the contrary that the plaintiffs' consent to the dismissal was "an open, voluntary renunciation of [plaintiffs'] claim in court," by which the plaintiff "forever loses his action." *Id.* at 95, quoting 3 Blackstone's Commentaries 296. The Court said that a judgment reciting "that the subject matter of the suit had been adjusted and settled by the parties" is "equivalent to a judgment that the plaintiff had no cause of action, because the defense of the defendant was found to be sufficient in law and true in fact." *Id.* at 95-96. Therefore, the Court concluded:

"It must be held that the judgment here in question was rendered upon the merits of the case, is final in its form and nature, and must have the effect of a bar to the present action upon the same cause." *Id.* at 96.

Although the motion to dismiss in *Parker* was made by the defendant rather than by the plaintiff, the decision turns on the consent of the plaintiffs' attorney to the recital that the underlying accounts had been settled or adjusted—a consent that the Court holds is sufficient to constitute a voluntary renunciation

of the claim. It is therefore immaterial that the court's order of dismissal in *Brown* was on the motion of the plaintiff United States. The *Brown* order, like the order in *Parker*, was expressly based on undisputed evidence that the underlying dispute had been resolved by agreement between the parties. In *Brown*, the attorney for the United States not only consented to the recital that the title dispute was resolved by the 1928 right-of-way agreement but stated affirmatively in moving for the dismissal that, on the merits, Mountain Bell had acquired "good and sufficient title" to the disputed right-of-way. (J.A. 36.) This is a stronger and clearer renunciation of the plaintiffs claim than the Government made in *Parker*; it is plainly no mere discretionary voluntary dismissal of a plaintiff's suit with the thought of perhaps filing again at a more propitious time.

Thus, under *Parker*, the dismissal of Mountain Bell from the quiet title suit was a dismissal with prejudice, quite apart from the equity presumption based on the absence of any provision to the contrary. On this ground as well, the *Brown* decree is a bar to further litigation.

B. All the Circumstances Support Application of Res Judicata in this Case.

Even if the preclusive effect of the *Brown* decree of dismissal were not clear as a matter of law, the circumstances surrounding the dismissal would make it a bar to further litigation, over a half century later, of the claim it dismissed as resolved. The parties themselves obviously regarded the dismissal as the end of litigation. And the intent of Congress in the Pueblo Lands Act, the special importance of res judicata in land title cases, and the interests of reliance and fairness, all require that the dismissal should be treated as the end of litigation in this case.

Like the suit to adjudicate water rights reviewed by this Court in *Nevada v. United States*, the *Brown* suit was "no garden variety quiet title action." 103 S.Ct. at 2925. It was one of several suits that the United States was required by the Pueblo Lands Act to bring in order to resolve long festering title problems engendered by this Court's decision in *United*

States v. Sandoval, 231 U.S. 28 (1913). Both the Act itself and its legislative history make clear that the intent of the statute was to resolve these title problems once and for all. (Pp. 22-24, *supra*.)

As we have seen, the Act established a Pueblo Lands Board to investigate all non-Indian claims of settlers on Pueblo land, and to identify every claimant to lands for which the Indian title had not been extinguished. Pueblo Lands Act § 2. All such claimants were to be named as defendants in quiet title suits such as the *Brown* suit, where their claims would be adjudicated; and the defendants were authorized to raise in those suits a defense of adverse possession that was otherwise unavailable. §§ 1, 4. Suits resolved in favor of non-Indian claimants—whether on the ground of adverse possession "or upon any other ground"—were to have "the effect of a deed or quitclaim as against the United States and said Indians . . ." § 5 (Pet. App. 28) (emphasis added).

Thus, by the express terms of the statute, every decree favoring a claimant such as Mountain Bell was intended to be final—to have all the dignity of a title deed. Moreover, the legislative history confirms that Congress intended the Act as a whole, and the quiet title suits in particular, to result in a comprehensive final settlement of the outstanding claims.³⁴ It

³⁴ See, e.g., S. Rep. No. 492, 68th Cong., 1st Sess. 3 (1924) ("This bill is an effort to provide for the final adjudication and settlement of a very complicated and difficult series of conflicting titles affecting lands claimed by the Pueblo Indians of New Mexico"); 65 Cong. Rec. 8442 (1924) (Sen. Bursum) (*Sandoval* made it necessary "to have some kind of legislation which would settle and adjudicate the controversy on the basis of equity and right and giving to each that to which he was entitled"); *id.* (Sen. Adams) ("this is an effort to provide a method of adjudication and to establish titles. It resembles in a way the water-adjudication statutes with which the Senator from Arizona is familiar"). Several reports on bills preceding S. 2932, which became the Act, and the report on S. 2932 itself, recited the purpose of the legislation in identical terms: "To settle the complicated questions of title and to secure for the Indians all of the lands to which they are entitled is the purpose of this bill." S. Rep. No. 492, n. 15 *supra*, at 3; S. Rep. No. 1175, 67th Cong., 4th

is inconsistent with both the terms of the Act and its purpose to deny preclusive effect to the dismissal of a quiet title suit brought under the Act, in the absence of the clearest indication that the dismissal was intended to be without prejudice.³⁵

Applying *res judicata*, based on the *Brown* decree, to bar the present action is also particularly appropriate because of the peculiar force of the policies underlying that doctrine as applied to judgments involving title to real property. As this Court emphasized only last year, "the policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water." *Nevada v. United States*, *supra*, 103 S.Ct. at 2918 n.10. And the Court has long recognized the special need for certainty and predictability where land titles are concerned. *See, e.g., Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979); *Minnesota Co. v. National Co.*, 3 Wall. 332, 334 (1865); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486-87 (1924). This need is at its most acute in a quiet title suit, the whole purpose of which is to obtain a declaration of title on which the owner and his successors can rely for ever after, avoiding the possibility that, if questions are later raised, witnesses may be dead and gone and documentary evidence may be incomplete and unreliable. In such a case, every presumption ought to be indulged in favor of finality.

Moreover, it is inequitable to allow relitigation of the *Brown* case at this late date. Upon its dismissal from the special statutory quiet title suit, Mountain Bell had every reason to

Sess. 3 (1923) (S. 3855); H.R. Rep. No. 1748, 67th Cong., 4th Sess. 3 (1923) (S. 3855); H.R. Rep. No. 1730, 67th Cong., 4th Sess. 6 (1923) (H.R. 13452).

³⁵ In addition, the voluntary dismissal of Mountain Bell in *Brown* was consistent with the congressional expectation that many clouded titles could be cleared simply by disclaimers and consent decrees. 1923 Senate Hearings 102 (Senator Jones) ("perhaps 90 percent of these adverse claims can be recognized without litigation"); *id.* at 242 (Senator Wilson) ("there should be a pro forma adjudication of uncontested titles").

believe that the title question was finally resolved, just as it would have been had Mountain Bell remained in the case and proved the validity of its claim. It relied on the decree for over 50 years, forgoing both the opportunity to prove its case and other means of establishing or acquiring good title, such as condemnation or a right-of-way grant from the Secretary of the Interior, that may no longer be available and that in any event would have protected it against continuing liability for a trespass it had no reason to believe it was committing. To allow reopening of the title issue over a half century later, when early records are gone, defenses have been lost, and alternative remedies removed, is manifestly unfair.

For all these reasons, were there any doubt as to the preclusive effect of the *Brown* decree under the prevailing rules of equity, the doubt should be resolved in favor of applying *res judicata*. This is a case that fairly cries out for repose and an end to litigation.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court with instructions to grant Mountain Bell's motion for partial summary judgment, thereby validating its right-of-way for telephone poles across the Pueblo of Santa Ana's El Ranchito tract beginning in 1928.

Respectfully submitted,

WILLIAM H. ALLEN	KATHRYN MARIE KRAUSE
RUSSELL H. CARPENTER, JR.	MARY C. SNOW
LAIRD HART	931-14th Street
Covington & Burling	Room 1300
1201 Pennsylvania Avenue,	Denver, Colorado 80202
N.W.	(303) 624-2200
P.O. Box 7566	
Washington, D.C. 20044	
(202) 662-6000	

Attorneys for Petitioner

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APPENDIX

Appendix 1

Santa Fe, N.M.
February 27, 1926
c/o Pueblo Lands Board

United States as guardian of the Pueblo of Jemez, v. Santa
Fe Northwestern Ry. Co.

The Attorney General,

Washington, D.C.

Sir:

This is one of the suits to quiet title following the report of the Pueblo Lands Board. It is at issue and could be tried at any time when a Federal Judge is available. There has recently occurred a new development, however.

This railroad was started as a private logging railroad, but has more or less developed until it is now about 40 miles long and has been recognized as a common carrier by the Interstate Commerce Commission. A further extension of 20 miles is being arranged, and it is locally hoped and expected that still further extensions will be made and that the road will be a valuable agency in developing the state.

Its right-of-way crosses not only Jemez but three other Pueblos, and was obtained in each case under the 1899 Act: U.S. Compiled Statutes, Section 4181, et. seq. The Pueblo Lands Board concluded that this Act was not broad enough to cover lands owned in fee by the Pueblo Indians and reported that the title to the land occupied by the Railway remained unextinguished in the Indians, subject to the easement of right-of-way, if any valid easement had been actually acquired. I agreed with the Board in believing that the Act of 1899 did not cover in this case. For this reason, and under the express requirements of the Pueblo Lands Act, a suit to quiet title became inevitable. You will find a discussion, both

of the facts and law, in my letters of November 4th and November 27, 1925, to you.

It now transpires that at the time the suit was filed, viz: about January 8, 1926, the White Pine Lumber Company, which is practically identical with the Railway Company, was negotiating a loan of over a million dollars to be secured by a bond issue covering properties, as I understand it, both of the Lumber Company and of the Railway Company, the proceeds to be used for further development work. The suit evidently came as a great surprise to the Railway Company, which had apparently not studied the Act of 1899 carefully and which, having fully complied with all the requirements of the Department of the Interior, believed its title to be sound. The bond houses in Chicago, which were preparing to underwrite the bond issue, immediately took cognizance of the situation, and after some correspondence a conference was had here yesterday, at their request. There were present, Governor H. J. Hagerman, who represents the Secretary of the Interior on the Pueblo Lands Board; Mr. Cochrane, Special Attorney for the Pueblo Indians; Judge Hanna, of Albuquerque, who is attorney for some of the Indian Aid societies and, as well, for local companies desirous of obtaining rights of way for power lines across some of the Pueblos; Mr. Porter, Vice-President of the Railway Company; Judge Hawley, of Chicago, representing the bond houses; and myself. The results of a lengthy discussion may be briefly summarized thus:

1. The Railway and Bond house representatives could not offer any plausible defense to the suit. In other words, while they would not admit that the Act of 1899 was inapplicable, it was quite clear that they felt such to be the case.

2. It was the general sense of all present that while the Pueblos should be protected in every way, their peculiar status ought not to put them in a more favored position than other Indians or than white men, so as to be able to prevent

railways, telegraph and telephone and power lines, etc. from crossing their grants. It also seemed fairly clear that this Railway has been a benefit rather than a detriment to the Jemez pueblo, being of some value to the Indians for transportation, and affording employment to a number of them. As above stated, this enterprise is favorably regarded in New Mexico as an existing agency of development which promises to be increasingly valuable to the state.

3. It was therefore felt that the government should not interfere with the Railway or its projected loan further than duty absolutely required, and there was much discussion as to how the right-of-way could be legalized. One alternative is offered by Section 17 of the Pueblo Lands Act, reading:

"Sec. 17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior."

This section presents one of the numerous puzzles offered by the Act. At first reading the two halves of the section seem contradictory; the first saying that no title to the Pueblo Lands shall be acquired except under subsequent legislation by Congress, and the second half saying, in effect, that conveyance by Pueblos, or individuals thereof, may be valid if approved by the Secretary of the Interior. We concluded, however, that the two halves might be harmonized by construing the first to mean that no title could be adversely acquired except under subsequent acts of Congress, and the

second to mean that the Pueblos might voluntarily convey, and that such conveyance would be good if approved by the Secretary. Like so many other feature [sic] of this Act, the foregoing construction cannot be considered certain, but seems reasonable.

Since the conference, defendant's representatives have announced a purpose of immediately approaching the Secretary of the Interior in an attempt to agree upon a form of deed acceptable to him, which they will then try to have executed by the Pueblo authorities, and returned to Washington for approval. If all this succeeds, the bonding houses will apparently be willing to make the proposed loan.

In any effort to procure a conveyance from the Pueblo, the Company will doubtless be met with a demand for additional compensation. I have heretofore expressed a doubt whether the damages already paid are adequate, and if the general scheme is approved, the question of increased compensation will be looked into by the Special Attorney for the Pueblo Indians. You will note that Section 17 does not expressly say that Pueblo conveyances shall hereafter be valid if approved by the Secretary, but merely that they shall *not* be valid unless so approved. Theoretically, and in fact, the Pueblo Indians are incompetent to manage their own affairs, and I think it unfortunate if the Pueblo corporations—and still more the individual Indians—are now authorized to convey, even subject to an approval, which must usually be based on the recommendation of some local official who may or may not be fully informed and disinterested. However, in the present instance the railway is already constructed and cannot well be got rid of; it has paid a considerable sum (nearly \$3,000 to Jemez Pueblo) as damages; it appears to be a public benefit; and if it deems this method of curing its title sufficient, and can bring it about, I think the general good would be served by acquiescing rather than by urging the doubts suggested by Sec. 17.

4. In the long run, I believe that the only certain way of rectifying the general situation is by Act of Congress. It is fair that the Pueblos should be subject to the acquisition of rights of way for public utilities of all sorts, just as other Indians are, on payment of just compensation. It was suggested at the conference that it would not be difficult to frame an Act making the provisions of U.S. Compiled Statutes, Section 4181, et. seq., applicable to the Pueblos; but defendant has apparently decided to try the other course first.

5. One result of all the foregoing is that the Railway Company would like the suit to lie dormant until they can make an attempt to validate their title by one or the other of the above methods. If either should succeed, the controversy would become moot and the suit could be dismissed. They are naturally reluctant to run the risk of a judgment declaring in effect that they are trespassers, and call attention to their good faith and to the prima facie validity of the permit of the Secretary under which they acted. They also promise immediate action in the way above indicated, and obviously they cannot hope otherwise to obtain their loan.

I therefore ask authority to suspend proceedings in this suit for a reasonable time, until we see what they can accomplish.

I understand that Governor Hagerman and Mr. Cochrane agree with my views as to the desirability of assisting rather than thwarting the railway project, and that the former will so report to the Department of the Interior.

Respectfully,
s/GEO A. H. FRASER
Special Assistant to
the Attorney General

Appendix 2

DEPARTMENT OF JUSTICE

Santa Fe, N.M., Jan. 4, 1927.
c/o Pueblo Lands Board.

Messrs. Smith & Brock, Att'ys,
for the Mountain States Tel. & Tel. Co.,
Denver, Colorado

In re: Telephone lines on the Pueblo of Taos
Pueblo of Taos,
Taos County, New Mexico.

Dear Sirs:

In my capacity as attorney for the United States with instructions to bring suit to quiet title to effectuate the decisions of the Pueblo Lands Board on Pueblo titles in New Mexico, I write to inquire the facts with regard to your two telephone lines crossing the Pueblo of Taos. My information, which is very meagre, is to the effect that your main line now enters the Pueblo grant from the south, and after proceeding northerly for some distance, thence progresses in an easterly and westerly direction across the main grant and also across the Tenorio tract, which also belongs to the Pueblo. Further, I understand that you own, or operate, an earlier line, originally constructed by, or for, Dr. Thomas Martin, of Taos, the exact location of which I do not know.

The Board probably sometime during the present month will file its report on this Pueblo determining which titles of settlers or other intruders on the grant are valid and which invalid. Among these titles will be yours to these two telephone lines. I have heard that you took some steps to legitimate your title to the new main line, but cannot learn here exactly what you did. A somewhat similar situation arose on the Pueblo of Jemez with regard to a railway there which supposed that it had acquired a satisfactory title under the Act of March 2, 1899, 30 Stat. 990, as amended, 36 Stat. 859, U.S. Compiled Statutes,

Sec. 4181, et seq. I made up my mind that no title could be obtained to any portion of the Pueblo Indian grants under these statutes, and was therefore forced to bring suit to quiet title against this railway. One result of this was that in 1926 a statute was passed permitting the condemnation of Pueblo Indian lands in New Mexico. The Pueblo Lands Act of June 7, 1924, 43 Stat. 331, also provides in section 17 a method whereby titles may be procured from the Pueblo Indians with the assent of the Secretary of the Interior. In my judgment these are the only two ways whereby a good title can now be obtained.

I have, of course, no hostile feeling towards your Company, but it is necessary that this question of title shall be cleared up, and with that end in view I would be greatly obliged if you would let me know exactly what the present status of your right is to the two lines above mentioned and any other telephone line, if such there is, on the Taos Pueblo grant.

Please address me "c/o Pueblo Lands Board, Santa Fe, New Mexico."

With kindest personal regards, I am.

Very sincerely yours,
/s/ GEORGE A. H. FRASER
Special Assistant to
the Attorney General

GAHF-S

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No. 84-262

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,
v. *Petitioner,*
PUEBLO OF SANTA ANA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

**BRIEF AMICUS CURIAE OF THE ATCHISON, TOPEKA
AND SANTA FE RAILWAY COMPANY IN SUPPORT
OF THE BRIEF OF THE PETITIONER**

GUS SVOLOS
GARY L. CROSBY
SANTA FE INDUSTRIES, INC.
224 South Michigan Avenue
Chicago, Illinois 60604
(312) 347-2283

JOHN R. COONEY
Counsel of Record

LYNN H. SLADE

JOHN S. THAL

WALTER E. STERN III

MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.

Post Office Box 2168

Suite 1000, Sunwest Building

500 Fourth Street, NW

Albuquerque, New Mexico 87103

Telephone: (505) 848-1800

*Attorneys for The Atchison,
Topeka and Santa Fe Railway
Company*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF <i>AMICUS CURIAE</i>	1
STATUTORY PROVISION INVOLVED	4
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE TENTH CIRCUIT ERRED IN INVALIDATING TITLES WHICH ARE BASED UPON AN ADMINISTRATIVE INTERPRETATION CONSISTENT BOTH WITH THE LANGUAGE AND PURPOSE OF THE PUEBLO LANDS ACT AND WITH POLICIES UNDERLYING FEDERAL RESTRAINTS ON ALIENATION..	5
A. The Administrative Interpretation, Establishing Now Long-Standing Titles, Is Conclusive If Reasonable	6
B. The Administrative Interpretation Is Reasonable Because It Is Consistent with the Language and Purpose of the Pueblo Lands Act..	9
1. The administrative interpretation is consistent with the language of § 17; the statute does not unambiguously require subsequent Congressional authorization for voluntary Pueblo conveyances approved by the Secretary	9
2. The administrative interpretation is consistent with the purposes of the Pueblo Lands Act	11
C. Principles Underlying Federal Restraints on Alienation Support the Validity of Rights-of-Way Granted by a Pueblo and Approved by the Secretary Pursuant to § 17	16

TABLE OF CONTENTS—Continued

	Page
II. THE TENTH CIRCUIT OPINION IGNORES CONGRESSIONAL INTENT THAT DECREES ENTERED IN PUEBLO LANDS ACT QUIET TITLE SUITS BE FINAL AND PRECLUSIVE	20
A. The Tenth Circuit Failed to Accord the Consent Decree Preclusive Effect in Accordance with the Intention of the Parties	21
B. The Pueblo Lands Act Contemplates That Consent Decrees Be Entered to Confirm Non-Indian Titles Which the United States Determined Were Valid After Commencement of Suit	23
C. In Providing for Quiet Title Suits Under the Pueblo Lands Act, Congress Chose a Procedure Intended to Ensure Final Resolution of the Land Disputes	25
D. The Merits of the Prior Action Cannot Deprive a Consent Decree of Preclusive Effect....	26
E. The Form of the Order of Dismissal Did Not Deprive It of Preclusive Effect	27
F. The Orders of Dismissal Established Rules of Property No Longer Subject to Change	28
CONCLUSION	30
APPENDICES:	
APPENDIX A—Tenth Circuit Opinion	1a
APPENDIX B—District Court Opinion	13a
APPENDIX C— Pueblo Lands Act of June 27, 1924	22a
APPENDIX D—Act of June 30, 1834, 25 U.S.C. § 177..	34a

TABLE OF CONTENTS—Continued

	Page
APPENDIX E—Excerpts from Hearings Before a Subcommittee of the Committee on Public Lands and Surveys, United States Senate, 67th Congress, 4th Session on S. 3865 and S. 4223 (1923)	35a
APPENDIX F—Excerpts of Hearings on H.R. 13452 and H.R. 13674 Before the House of Representatives Committee on Indian Affairs, 67th Cong., 4th Sess. (1923) ..	46a
APPENDIX G—July 20, 1928 Letter from John Collier to Mr. W. B. Storey, President of The Atchison, Topeka & Santa Fe Railway Company	48a
APPENDIX H—Act of February 27, 1925, 43 Stat. 1008; Act of July 2, 1945, 59 Stat. 313; Act of May 27, 1908, 35 Stat. 312	50a
APPENDIX I—Excerpts from Transcript of the Proceedings of the Pueblo Indian Council held at Pueblo of Santo Domingo, on January 17, 1924	53a
APPENDIX J—Brief on Behalf of the Council of all New Mexico Pueblos	63a

TABLE OF AUTHORITIES

Cases:	Page
<i>Andrus v. Shell Oil Co.</i> , 446 U.S. 657 (1980)	8
<i>Angel v. Bullington</i> , 330 U.S. 183 (1947)	23
<i>Arizona v. California</i> , 439 U.S. 419 (1983)	29
<i>Boy's Market, Inc. v. Retail Clerk's Union, Local 770</i> , 398 U.S. 235 (1970)	11
<i>Chemehuevi Tribe of Indians v. FPC</i> , 420 U.S. 395 (1975)	11, 14
<i>Chouteau v. Moloney</i> , 57 U.S. (16 How.) 203 (1853)	19
<i>De Coteau v. District County Court</i> , 420 U.S. 425 (1975)	14
<i>Durant v. Essex Co.</i> , 74 U.S. (7 Wall.) 107 (1869) ..	28
<i>Federal Election Commission v. Democratic Senatorial Campaign Committee</i> , 454 U.S. 27 (1981) ..	11
<i>Holden v. Joy</i> , 84 U.S. (17 Wall.) 211 (1872)	18
<i>Home Owners Loan Corp. v. Huffman</i> , 134 F.2d 314 (8th Cir. 1943)	27
<i>In re Skinner & Eddy Corp.</i> , 265 U.S. 86 (1924)	27
<i>Johnson v. McIntosh</i> , 21 U.S. (8 Wheat.) 543 (1823)	18
<i>Jones v. Meehan</i> , 175 U.S. 1 (1899)	18, 19
<i>Lomax v. Pickering</i> , 173 U.S. 26 (1899)	20
<i>Lone Wolf v. Hitchcock</i> , 187 U.S. 554 (1903)	16
<i>Lyon v. The Perin & Gaff Manufacturing Co.</i> , 125 U.S. 698 (1888)	28
<i>McLaren v. Fleischer</i> , 256 U.S. 477 (1921)	7
<i>Minnesota Mining Co. v. National Mining Co.</i> , 70 U.S. (3 Wall.) 332 (1866)	29
<i>Mitchel v. United States</i> , 34 U.S. (9 Pet.) 711 (1835)	18
<i>Munez v. Hoffman</i> , 422 U.S. 454 (1975)	17
<i>Nashville, Chattanooga & St. Louis Railway Co. v. United States</i> , 113 U.S. 261 (1885)	26
<i>National Life & Accident Insurance Co. v. Parkinson</i> , 136 F.2d 506 (10th Cir. 1943)	26, 27
<i>Nevada v. United States</i> , 103 S.Ct. 2906 (1983)	passim
<i>Oglala Sioux Tribe v. United States</i> , 650 F.2d 140 (8th Cir. 1981), cert. denied, 455 U.S. 907 (1982)	29

TABLE OF AUTHORITIES—Continued

	Page
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	13
<i>Pickering v. Lomax</i> , 145 U.S. 310 (1892)	19
<i>Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers</i> , 367 U.S. 396 (1961)	7
<i>Pueblo of Santa Ana v. United States</i> , Indian Claims Commission Docket No. 137, 33 Ind. Cl. Comm. 16 (1974)	29
<i>Rice v. Rehner</i> , 103 S.Ct. 3291 (1983)	14
<i>Smith v. Stevens</i> , 77 U.S. (10 Wall.) 321 (1870)	20
<i>Southern Pacific Transportation Co. v. Watt</i> , 700 F.2d 550 (9th Cir.), cert. denied, 104 S.Ct. 393 (1983)	2
<i>Swift & Co. v. United States</i> , 276 U.S. 311 (1928) ..	26, 27
<i>Tiger v. Sellers</i> , 145 F.2d 920 (10th Cir. 1944)	20
<i>Tiger v. Western Investment Co.</i> , 221 U.S. 286 (1911)	20
<i>Udall v. Tallman</i> , 380 U.S. 1 (1964)	8
<i>United States v. Armour & Co.</i> , 402 U.S. 675 (1971)	23
<i>United States of America as Guardian of the Pueblo of Acoma v. Arvizo</i> , No. 2079 in Equity (D.N.M. March 27, 1930)	21
<i>United States of America as Guardian of the Pueblo of Santa Ana v. Brown</i> , No. 1814 in Equity (D.N.M. Nov. 25, 1927)	21, 23, 27
<i>United States v. The Burlington & Missouri River Railroad Co.</i> , 98 U.S. 334 (1879)	6, 8
<i>United States v. California & Oregon Land Co.</i> , 192 U.S. 355 (1904)	25
<i>United States v. Candelaria</i> , 271 U.S. 432 (2926) ..	12, 14, 18
<i>United States v. City of McAlester, Oklahoma</i> , 604 F.2d 42 (10th Cir. 1979)	20
<i>United States v. Heirs of Boisdoré</i> , 49 U.S. (8 How.) 113 (1850)	11
<i>United States v. ITT Continental Baking Co.</i> , 420 U.S. 223 (1975)	22, 23

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Fisher</i> , 6 U.S. (2 Cranch) 358 (1805).....	5, 6
<i>United States v. Joseph</i> , 94 U.S. 614 (1877).....	3, 11
<i>United States v. Pico</i> , 72 U.S. (5 Wall.) 536 (1867).....	19
<i>United States v. Sandoval</i> , 231 U.S. 28 (1913).....	3, 11, 12, 20
<i>United States v. Southern Pacific Transportation Co.</i> , 543 F.2d 676 (9th Cir. 1976).....	9
<i>United States v. State Bank of North Carolina</i> , 31 U.S. (6 Pet.) 28 (1832).....	8
<i>United States v. Title Insurance & Trust Co.</i> , 265 U.S. 472 (1924).....	8, 29
<i>United States v. Waller</i> , 243 U.S. 452 (1917).....	13
<i>Federal Statutes and Regulations:</i>	
Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137.....	16, 17
Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329.....	17
Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469.....	17
Act of March 3, 1799, ch. 46, § 12, 1 Stat. 743.....	17
Act of March 30, 1802, ch. 13, § 12, 2 Stat. 139.....	17
Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730, 25 U.S.C. § 177 (1982).....	16
Act of February 27, 1851, ch. 14, § 7, 9 Stat. 587.....	18
Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, 25 U.S.C. § 71 (1982).....	16
Act of March 2, 1899, ch. 377, § 1, 30 Stat. 990, 25 U.S.C. § 312 (1982).....	9
Act of May 27, 1908, § 9, 35 Stat. 312.....	20
Pueblo Lands Act of June 7, 1924, 43 Stat. 636.....	<i>passim</i>
Act of February 27, 1925, § 3, 43 Stat. 1008.....	20
Act of May 10, 1926, 44 Stat. 498.....	9
Act of April 21, 1928, 45 Stat. 442, 25 U.S.C. § 322 (1982).....	9
Act of September 1, 1937, § 10, 55 Stat. 900 (1937).....	20
Act of July 2, 1945, 59 Stat. 313 (1945).....	20
Indian Claims Commission Act of 1946, 65 Stat. 1049, formerly codified at 25 U.S.C. §§ 70-70u (1976).....	29

TABLE OF AUTHORITIES—Continued

	Page
25 U.S.C. §§ 311-321 (1982).....	13
49 U.S.C. §§ 10101-11917 (Supp. 1984).....	1
25 C.F.R. § 169.3(a) (1984).....	2
25 C.F.R. § 169.19 (1984).....	2
25 C.F.R. § 169.23(a) (1984).....	2
<i>Legislative History:</i>	
S. Rep. No. 1175, 67th Cong., 4th Sess. (1923).....	14
H.R. Rep. No. 474, 23rd Cong., 1st Sess. (1834)....	17
Hearings on S.3865 and S.4123 Before a Senate Subcommittee of the Committee on Public Lands and Surveys, 67th Cong., 4th Sess. (1923).....	7
Hearings on H.R. 13452 and H.R. 13674 Before the House of Representatives Committee on Indian Affairs, 67th Cong., 4th Sess. (1923).....	7
<i>Other Authorities:</i>	
American State Papers (Indian Affairs, Vol. I) (1832).....	17
F. Cohen, <i>Federal Indian Law</i> (Univ. of N.M. Reprint, 1942 ed.).....	19
James, <i>Consent Judgments as Collateral Estoppel</i> , 108 U. Pa. L. Rev. 173 (1959).....	22
L. Kelly, <i>The Assault on Assimilation, John Collier and the Origins of Indian Policy Reform</i> (1st Ed. 1983).....	7
J. Pomeroy, <i>Equity Jurisprudence</i> (5th Ed. 1941)...	25, 26
F. Prucha, <i>American Indian Policy in the Formative years: The Indian Trade and Intercourse Acts</i> (1962).....	17, 18
T. Street, <i>Federal Equity Practice</i> (1909).....	27
R. Whitehouse, <i>Equity Practice</i> (1915).....	27

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-262

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,
v. *Petitioner,*
PUEBLO OF SANTA ANA,
Respondent.

**BRIEF AMICUS CURIAE OF THE ATCHISON, TOPEKA
AND SANTA FE RAILWAY COMPANY IN SUPPORT
OF THE BRIEF OF THE PETITIONER**

**On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit**

INTEREST OF THE AMICUS CURIAE

The Atchison, Topeka and Santa Fe Railway Company ("AT&SF") is a rail carrier operating an interstate railroad system subject to the jurisdiction of the Interstate Commerce Commission under the Revised Interstate Commerce Act, 49 U.S.C. §§ 10101-11917 (Supp. 1984).¹ AT&SF's system provides interstate rail transportation service over approximately 12,000 miles of track in 12 states. AT&SF is the only railroad serving the major New Mexico cities of Albuquerque, Santa Fe, Las Cruces and Roswell, as well as the Sandia National Laboratory and Kirtland Air Force Base, and is the only railroad in the northwest portion of the state. AT&SF also provides the most direct rail link between Denver, Colorado, and El Paso, Texas, and between Kansas City, Missouri, and Los Angeles, California.

¹ Pursuant to Rule 36 of the Rules of the Supreme Court of the United States (1980), AT&SF's brief *amicus curiae* is being filed with the written consent of the parties to the case.

In New Mexico, AT&SF's system operates over rights-of-way across lands of seven Pueblos occupying substantial portions of central New Mexico: the Pueblo of Santa Ana, the Pueblo of San Felipe, the Pueblo of Sandia, the Pueblo of Isleta, the Pueblo de Santo Domingo, the Pueblo de Acoma and the Pueblo of Laguna. These Pueblos are located south, west, and north of Albuquerque, and their lands straddle the middle Rio Grande valley and the main transportation corridors of the state. Without rights-of-way across these Pueblos, AT&SF would not have a continuous north-south or east-west system and could no longer operate as one of the Nation's transcontinental rail carriers.

The decisions below threaten invalidation of those portions of AT&SF's rights-of-way across Pueblo lands obtained pursuant to Section 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 ("§ 17"). Invalidation could destroy the continuity of AT&SF's system and the service it provides. Consequently, these decisions threaten a primary goal of the Revised Interstate Commerce Act: to "insure the development and continuation of a sound rail transportation system . . ." 49 U.S.C. § 10101(a) (Supp. 1984).

The decisions below could force interruption of AT&SF's service and interfere with transportation and commerce in the Southwest. To date, the Pueblos of Isleta and Acoma have sued to eject AT&SF from their lands based upon the District Court decision. Further, replacement of rights-of-way lost in litigation could prove difficult or impossible because present Department of the Interior regulations require the consent of an Indian tribe or Pueblo to the granting or renewal of any right-of-way across its lands and empower it to withhold consent entirely. See 25 C.F.R. §§ 169.3(a), 169.19, 169.23(a) (1984); see also *Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550 (9th Cir.), cert. denied, 104 S.Ct. 393 (1983). Consequently, AT&SF cannot be certain of being allowed to maintain its railroad facilities in their existing

locations on Pueblo lands. The practical and economic effect on AT&SF of being required to relocate its facilities, assuming such were feasible, are staggering. AT&SF would be required to acquire scores of miles of new rights-of-way and to construct new trackage at greatly increased right-of-way and construction cost. Because several of the Pueblos lie astride the Rio Grande valley between Santa Fe and Albuquerque, bordered by the Jemez mountains to the west and the Sandia mountains to the east, AT&SF could suffer the additional burden of having to construct over mountainous terrain and over a much longer route. During relocation, major New Mexico cities would be without rail service and one of the Nation's transcontinental rail routes would be disabled.

The current situation stems from the construction of AT&SF's system in New Mexico in the late 1880's when AT&SF and its corporate predecessor obtained rights-of-way across each of the Pueblos' lands. AT&SF, in reliance on the decision in *United States v. Joseph*, 94 U.S. 614 (1877), obtained these rights-of-way by negotiation or condemnation. Following the decision in *United States v. Sandoval*, 231 U.S. 28 (1913), and the enactment of the Pueblo Lands Act, AT&SF negotiated for and obtained the voluntary agreement of pertinent Pueblos to new rights-of-way that were approved by the Secretary of the Interior expressly acting pursuant to § 17. The Respondent, Pueblo of Santa Ana, granted to AT&SF an easement dated October 5, 1928, that subsequently was approved by the Secretary pursuant to § 17. Prior to the District Court's decision, AT&SF was aware of no question as to the validity of these approved rights-of-way.

AT&SF is also affected by the *res judicata* holdings of the courts below because AT&SF, like Mountain States Telephone and Telegraph Company ("Mountain Bell"), and the United States acting on behalf of pertinent Pueblos agreed to consent decrees in quiet title suits filed by the United States for Pueblos pursuant to Section 3 of the Pueblo Lands Act [App. 23a]. The orders of dismissal of

those suits, as to both AT&SF in numerous cases and Mountain Bell in this case, were entered pursuant to agreements between the United States attorney representing the Pueblos and counsel for the company that the quiet title suit would be dismissed if new rights-of-way were obtained from the Pueblo and approved by the Secretary under § 17.² The decisions below undermine the finality of consent judgments long relied upon by AT&SF.

STATUTORY PROVISIONS INVOLVED

Pueblo Lands Act of June 7, 1924, 43 Stat. 636 ("Pueblo Lands Act"). The full text of the Pueblo Lands Act is reproduced as Appendix C. [App. 22a-33a].

SUMMARY OF ARGUMENT

I. The Court of Appeals erred in discarding the agency interpretation of § 17 of the Pueblo Lands Act based solely upon the court's superficial examination of a portion of the statutory language. The courts below failed to recognize that the different terms employed in the two clauses of § 17 compel a full examination of all matters bearing on legislative intent. Principles traditionally insulating titles based upon administrative action from judicial invalidation were ignored, and the failure of the courts below to consider the purposes of the Pueblo Lands Act and prevailing contemporaneous notions respecting the validity of Pueblo conveyances mandate reversal of the Court of Appeal's decision. Finally, the courts below ignored this Court's decisions affirming a tribal power of alienation subject to the federal supervision designated in statutory restraints on alienation.

II. Policies of finality underlying the Pueblo Lands Act and the *res judicata* doctrine require that orders of dismissal entered in Pueblo Lands Act quiet title actions be given preclusive effect. Orders of dismissal entered by

² AT&SF also holds rights-of-way granted by Pueblos and approved under § 17 that were not subject to Pueblo Lands Act consent decrees because they were granted after the conclusion of such suits.

consent of the parties should be construed to effect the parties' intentions that Pueblo claims be finally resolved. In providing for quiet title actions before an equity court, Congress chose a procedure intended to ensure final resolution of the Pueblo land disputes. Finally, the many orders of dismissal entered in Pueblo Lands Act quiet title suits that affirm the validity of § 17 rights-of-way establish a rule of property no longer subject to judicial reconsideration.

ARGUMENT

I. THE TENTH CIRCUIT ERRED IN INVALIDATING TITLES WHICH ARE BASED UPON AN ADMINISTRATIVE INTERPRETATION CONSISTENT BOTH WITH THE LANGUAGE AND PURPOSE OF THE PUEBLO LANDS ACT AND WITH POLICIES UNDERLYING FEDERAL RESTRAINTS ON ALIENATION.

The fundamental flaw in the Tenth Circuit opinion is its conclusion that § 17 unambiguously imposed the condition of subsequent congressional enactment of statutory authority upon the validity of Pueblo conveyances approved by the Secretary of the Interior; therefore, the court held it could invalidate numerous long-established rights-of-way without according any deference to the contemporaneous administrative interpretation of the provision. [App. 7-9]. The Court of Appeals erred in discarding the agency construction of § 17 in favor of its own superficial interpretation of a portion of the statutory language. The decisions below did not address critical matters that traditionally insulate titles resting upon administrative action from judicial invalidation—the long passage of time, prevailing contemporaneous notions respecting the validity of Pueblo and tribal conveyances, and reasonable reliance by grantees. The courts below disregarded Chief Justice Marshall's admonition that: "Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived." *United States v. Fisher*, 6 U.S. (2 Cranch)

358, 386 (1805). The Tenth Circuit erred because the different terms employed in the two clauses of § 17 compelled a full examination of all matters bearing on legislative intent and deference to an administrative interpretation having a reasonable basis in the language and purpose of the Pueblo Lands Act.

A. The Administrative Interpretation, Because It Established Now Long-Standing Titles, Is Conclusive If Reasonable.

The decision below erred in according no deference to the administrative interpretation undisputedly applied by the Secretary of the Interior; that agency interpretation was entitled to exceptional deference because it forms the basis for scores of long-standing titles to rights-of-way. Those rights-of-way have been relied upon for over 50 years by AT&SF, other grantees, and third parties in the establishment of patterns of transportation and commerce in New Mexico. Therefore, the rule stated by Justice Field in *United States v. The Burlington & Missouri River Railroad Co.*, 98 U.S. 334, 341 (1879), is controlling because "uniform" administrative action forms the basis for the land titles invalidated: "This uniform action is as potential, and as conclusive of the soundness of the construction, as if it had been declared by judicial decision. It cannot at this day be called in question."

As applied to the Interior Department's interpretation of § 17, this principle is particularly compelling. The Department of the Interior interpreted the second clause of § 17 as confirming its authority to approve rights-of-way voluntarily granted by a Pueblo as a community. Beginning in April, 1926, the Department of the Interior began approving rights-of-way pursuant to § 17. [J.A. 114-15]. Each of the 60 rights-of-way granted pursuant to § 17 across lands of the Pueblos, including the Pueblo of Santa Ana, now administered by the Southern Pueblos Agency of the Bureau of Indian Affairs ("BIA") was approved at the level of Secretary or Assistant Secretary of the

Interior [J.A. 114].³ The Court of Appeals did not dispute that the Secretary's approval of at least 60 rights-of-way spanning a period of nearly 30 years constituted both a contemporaneous and a long-standing interpretation.

The administrative interpretation is entitled to still greater deference because both Interior Department and Pueblo representatives participated in the legislative process. See *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers*, 367 U.S. 396, 308 (1961). Significantly, Pueblo members and their lawyers, citizens representing Pueblo interests, and Commissioner of Indian Affairs, Charles Burke, participated vigorously in the formulation of the Pueblo Lands Act. See Hearings on S. 3865 and S. 4223 Before a Senate Subcommittee of the Committee on Public Lands and Surveys, 67th Cong., 4th Sess. (1923) ("Senate Hearings"); Hearings on H.R. 13452 and H.R. 13674 Before the House of Representatives Committee on Indian Affairs, 67th Cong., 4th Sess. (1924) ("House Hearings"); see also L. Kelly, *The Assault on Assimilation, John Collier and the Origins of Indian Policy Reform* 255-93 (1983). The Pueblos thereafter affirmed the administrative construction by making each conveyance.

This Court's decisions require that exceptional deference be accorded administrative interpretations supporting titles to real property in recognition of expected reliance by grantees and third parties.⁴ As stated in *McLaren v. Fleischer*, 256 U.S. 477, 480-81 (1921), judicial review of such interpretations is strictly limited:

³ The record in the District Court did not address the number of rights-of-way approved pursuant to § 17 across lands of the eight Pueblos now administered by the Northern Pueblos Agency, BIA.

⁴ Doctrines restricting judicial intrusion into settled matters, such as the *res judicata* doctrine, "are at their zenith in cases concerning real property, land and water . . .", *Nevada v. United States*,

In the practical administration of the act the officers of the Land Department have adopted and given effect to the [challenged] view . . . Many outstanding titles are based upon it and much can be said in support of it. If not the only reasonable construction of the act, it is at least an admissible one. It therefore comes within the rule that the practical construction given to an act of Congress, fairly susceptible of different constructions, by those charged with the duty of executing it is entitled to great respect and, if acted upon for a number of years will not be disturbed except for cogent reasons.

A long-standing and reasonable interpretation supporting titles was held to be "conclusive" in *United States v. The Burlington & Missouri River Railroad Co.*, 98 U.S. 334, 341 (1879), because reliance upon the interpretation had taken many forms: "Patents have been issued, bonds given, mortgages executed, and legislation had upon the construction." See also *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667-68 (1980); cf. *United States v. State Bank of North Carolina*, 31 U.S. (6 Pet.) 28, 39 (1832). Interior Department interpretations of its authority to grant or approve conveyances of interests in real property are entitled to special deference because, as in *Udall v. Tallman*, 380 U.S. at 18, the administrative action contemplates the real property being "developed, at very great expense, in reliance upon the Secretary's interpretation." The Tenth Circuit disregarded that doctrines that protect reliance upon long-standing titles apply with full force to actions brought by Indian tribes. See *Nevada v. United States*, 103 S. Ct. at 2923-24.

Reliance upon the administrative interpretation has been substantial. AT&SF has relied upon it in maintain-

103 S. Ct. 2906, 2918, n. 10 (1983). The principle of deference to long-settled administrative action is another such doctrine. The "rule of property" doctrine also protects the stability of titles by requiring adherence to settled judicial decisions affecting title. See *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924); see Point II(F), *infra*.

ing and improving its railroad facilities in their present locations for over 50 years and in not obtaining rights-of-way under other statutes when the same rights-of-way could have been obtained without the consent of Pueblos.⁵ Other business and state and local governments have relied upon the interpretation in locating factories, warehouses, stockyards, streets and highways to facilitate access to AT&SF's existing route. The decisions below, invalidating rights-of-way relied upon in the development of New Mexico for over 50 years, cannot be reconciled with principles of deference to long-standing administrative action supporting titles.

B. The Administrative Interpretation Is Reasonable Because It Is Consistent with the Language and Purpose of the Pueblo Lands Act.

The language and legislative history of the Pueblo Lands Act demonstrate discrete purposes to be served by the two clauses of § 17. The Secretary's interpretation of § 17 is reasonable because it gives independent meaning to each clause of § 17 and is consistent with the purposes of the Pueblo Lands Act to settle comprehensively the status of Pueblo lands. The Tenth Circuit erred in rejecting the Secretary's interpretation that the second clause of § 17 authorized approval of rights-of-way voluntarily granted by a Pueblo.

1. The administrative interpretation is consistent with the language of § 17; The statute does not unambiguously require subsequent Congressional authorization for voluntary Pueblo conveyances approved by the Secretary.

The language of § 17 refutes the major premise of the Court of Appeals' decision that § 17 unequivocally re-

⁵ See Act of May 10, 1926, 44 Stat. 498; Act of April 21, 1928, 45 Stat. 442, 25 U.S.C. § 322 (1982); Act of March 2, 1899, ch. 374, § 1, 30 Stat. 990, 25 U.S.C. § 512 (1982); see also *United States v. Southern Pacific Transportation Co.*, 543 F.2d 676, 690-93 (9th Cir. 1976).

quires both subsequent Congressional authorization and Secretarial approval of any conveyance.⁶ [App. 7-9]. That construction renders § 17 patently ambiguous because its two main clauses employ different terms to describe the subject and effect of their provisions. Thus, the two clauses cannot pertain unambiguously to the subject of voluntary conveyances to which only the second clause refers. The terms of the two clauses are sufficiently different to preclude the assertion that Congress unambiguously intended the first clause to limit or pertain to the subject matter of the second. It makes neither logical nor grammatical sense to presume that the first clause, primarily pertaining to the acquisition of rights under state law, speaks unequivocally to the subject of the second clause, addressing conveyances made by a Pueblo and approved by the Secretary. The language employed in the two clauses of § 17 makes clear that Congress intended their provisions to address different matters.

The Tenth Circuit decision misinterprets this Court's decisions as sanctioning a more limited examination of legislative intent whenever the reviewing court finds that the statutory language "clearly means what it says" [App. 6a] or reflects a supposed "plain congressional intent." [App. 9a]. The Court of Appeals disregarded the rule that the intent of a statute asserted to be unambiguous must be determined in light of the purposes of the statutory scheme of which it is a part and the construc-

⁶ Section 17 of the Pueblo Lands Act provides:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

tion placed upon it by the agency charged with its administration. *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 404, 409 (1975). The Tenth Circuit erred in ignoring the administrative interpretation because the language of § 17 and the statutory purpose revealed by the legislative history do not "expressly or by necessary implication foreclose" the administrative construction. *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 36 (1981).

By ignoring legislative intent and administrative construction, the Tenth Circuit's analysis was both insufficiently rigorous and contrary to established principles of statutory interpretation. The Tenth Circuit's only explanation for its conclusion that § 17 imposed two conditions upon the validity of conveyances is the observation that "[t]he two clauses of § 17 . . . are joined by the conjunctive 'and' ". [App. 8]. This explanation is deficient because the conjunctive neither harmonizes the two clauses of § 17 nor furnishes any justification for ignoring the history and purposes of the Pueblo Lands Act. Moreover, the Tenth Circuit's analysis violates the long-established requirement that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and its object and policy." *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850); see also *Boy's Market, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 250 (1970).

2. The Administrative Interpretation Is Consistent with the Purpose of the Pueblo Lands Act.

The historical context and legislative history of the Pueblo Lands Act readily supply independent purposes to the two clauses of § 17. During the long period between this Court's decisions in *United States v. Joseph*, 94 U.S. 614 (1877), and *United States v. Sandoval*, 231 U.S. 28 (1913), the accepted law in the territory of New Mexico was that the New Mexico Pueblos could convey Pueblo

lands without approval of the United States, like any fee owner. See Senate Hearings 51 [App. 35a]. *Sandoval* drew the efficacy of such titles into question. See *United States v. Sandoval*, 231 U.S. at 38-40.⁷ The Pueblo Lands Act was intended to "settle the complicated questions of title [affecting Pueblos lands] . . ." arising from the *Sandoval* decision. House Hearings 6 [App. 46a].

The great bulk of the Pueblo Lands Act and its legislative history concern procedures for settling rights as between Pueblos and non-Indian claimants existing or asserted as of the date of the Pueblo Lands Act, June 7, 1924. The only generally applicable provision of the Act having prospective effect was § 17.⁸ The legislative history of the Pueblo Lands Act indicates two principal concerns respecting the prospective legal attributes of Pueblo lands, both arising from prior uncertainty as to the applicability of federal restraints on alienation to Pueblo lands. First, Congress desired to preclude the future involuntary loss of Pueblo lands which previously had resulted from state law condemnations, effects of judgments, the non-payment of taxes, and state law adverse possession statutes. See Senate Hearings 51, 54 [App. 36a-37a]. Second, the legislative hearings reflect a widespread opinion held by the Pueblos, the Interior Department, and non-Indians that recognized the propriety of Pueblo conveyances approved by the Secretary. Contrastingly, the legislative history reflects no intention that Pueblo conveyances so approved should not be

⁷ Not until the decision in *United States v. Candelaria*, 271 U.S. 432, 441 (1926), two years after passage of the Pueblo Lands Act, did this Court hold Pueblo lands to have been subject to federal restraints on alienation.

⁸ The only provision other than § 17 having prospective application was Pueblo Lands Act § 16 which pertained exclusively to "lands adjudged by said court or Board against any [non-Indian] claimant"; § 16 authorized the Secretary, with Pueblo consent, to sell such lands to the highest bidder.

valid. See House Hearings 40; Senate Hearings 50, 72-73, 154-155 [App. 46a, 35a-43a].⁹

The two clauses of § 17 are the only provisions of the Pueblo Lands Act that address these dual concerns. The first clause of § 17 addresses the congressional concern to prevent the involuntary loss of Pueblo lands. The clarification that such "rights" thereafter could not be "acquired or initiated" under state law was needed specially because substantial portions of the Pueblo Lands Act provided procedures by which non-Indians could maintain titles held by virtue of adverse possession or could assert other state legal or equitable defenses. See Pueblo Lands Act §§ 2-5. The first clause also precludes alienation pursuant to other federal Indian statutes then in force, many of which authorized Secretarial grants without tribal consent. See, e.g., 25 U.S.C. §§ 311-321 (1982). This presumably was a response to assertions that the Pueblos desired to maintain some voice in the management of their lands. House Hearings 134; Senate Hearings 77 [App. 37a, 43a].¹⁰

⁹ The prevailing belief that approval by the United States would validate Pueblo conveyances was further reflected in a written statement submitted by the Pueblos to Congress. See Brief to Congress In the Matter of The New Mexico Pueblo Lands "White Claims Upon Lands Granted to the Pueblos." National Archives file G.S. 013-1921, 45918 Pt. 8-Pt. 8-19. [Excerpts reproduced as Appendix J, App. 63a-68a]. By disregarding these contemporaneous statements, the decision below conflicts with the requirement that Indian statutes "must be read in light of common notions of the day and the assumption of those who drafted them . . ." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

¹⁰ As this Court stated, "Congress may relieve the Indians from [its] . . . guardianship and control, in whole or in part, and may, if it sees fit, clothe them with full rights and responsibilities concerning their property, or give them a partial emancipation if it thinks that course better for their protection." *United States v. Waller*, 243 U.S. 452, 459-60 (1917). Section 17 continued the "partial emancipation" respecting Pueblo fee-owned lands, begun in the

The second clause of § 17 imposes only the express restraint upon alienation of Secretarial approval of conveyances voluntarily "made" by a Pueblo but does not disallow those conveyances. This provision is consistent with legislative recognition of the propriety of Pueblo conveyances approved by the Secretary. Thus, § 17 is clear, direct and unambiguous when given the meaning adopted by the Secretary, but its provisions are inconsistent and ambiguous under the interpretation adopted by the Tenth Circuit. The language of § 17's second clause, "read together with the rest of the Act, as it must be . . .," *Chemehuevi Tribe of Indians v. FPC*, 420 U.S. 395, 403 (1975), compels the conclusion that § 17 was intended to provide authority for future conveyances by the Pueblos.¹¹

The Court of Appeals' interpretation that § 17 prohibited, rather than authorized, grants of rights-of-way by Pueblos with the consent of the Secretary further conflicts with the overriding statutory purpose of the Pueblo Lands Act to settle comprehensively the status of Pueblo lands. See S. Rep. No. 1175, 67th Cong., 4th Sess. 5 (1923) [App. 46a]. The construction of the courts below would result in an anomaly neither suggested by the legislative history nor addressed by the Tenth Circuit: the Pueblo Lands Act would have rendered Pueblos, unlike all other Indian tribes, powerless to convey publicly needed rights-of-way or any other interest in their lands, even

Spanish era, allowing voluntary conveyances with Secretarial approval while protecting against involuntary alienation. See *United States v. Candelaria*, 271 U.S. at 442.

¹¹ The Tenth Circuit suggests it considered itself bound to resolve any ambiguities in statutory language in favor of the Pueblo [App. 9]. That conclusion disregards that the rule cited is "at base a canon for construing" statutes and "is not a license to disregard clear expressions of tribal and congressional intent." *De Coteau v. District County Court*, 420 U.S. 425, 447 (1975); see also *Rice v. Rehner*, 103 S.Ct. 3291, 3302 (1983).

with Secretarial approval.¹² The legislative history precludes this interpretation of the Pueblo Lands Act.

Congress should not be deemed to have intended, *sub silentio*, to preclude any conveyances of Pueblo lands in a bill designed to "settle the complicated questions of title" affecting Pueblo lands. House Hearings 6 [App. 46a]. The Tenth Circuit's conclusion that Congress intended to leave the whole matter of prospective conveyances to some future Congress while inexplicably imposing a requirement of Secretarial consent on conveyances "made" by a Pueblo is not only nonsensical, but also conflicts with the central legislative purpose to resolve questions respecting Pueblo lands. The Court of Appeals erred in discarding the administrative interpretation that achieved this central purpose.

¹² That the Pueblos understood the Pueblo Lands Act would authorize grants of new railroad rights-of-way to AT&SF is indicated by the transcript of the council of Pueblo delegates held on January 17, 1924 at the Pueblo of Santo Domingo to confirm their position on the pending legislation. [Excerpts of text reproduced as Appendix H, App. 43a-62a]. At that council, then Pueblo representative in the legislative hearings, and later Commissioner of Indian Affairs, John Collier, specifically addressed AT&SF's rights-of-way:

Now the Pueblos have already said that they are willing to give up their title to the . . . rights-of-way of the railroads, if those rights-of-way have been paid for,—if the Indians had payment for them. That means proper payment,—the payment they ought to have. [App. 59a].

Thereafter, AT&SF paid new consideration for its presently challenged § 17 rights-of-way. The Pueblos subsequently confirmed to AT&SF their desire that AT&SF continue to operate on their lands. As stated in Collier's July 20, 1928 letter to Mr. W.B. Storey, President of AT&SF [Excerpts reproduced as Appendix G, App. 48a-49a]:

In many ways the interests of the Pueblo Indians and of the Santa Fe Railway are identical; . . . Ultimately the chief outside force in making possible a future for these Pueblos will be the Santa Fe Railway, as we are increasingly convinced.

C. Principles Underlying Federal Restraints on Alienation Support the Validity of Rights-of-Way Granted by a Pueblo and Approved by the Secretary Pursuant to §17.

The decisions below are further flawed by their premise that an interpretation of § 17 consistent with that given the Indian Nonintercourse Act of 1834, 4 Stat. 730, 25 U.S.C. § 177 (1982) ("Nonintercourse Act"), would require a greater expression of Congressional intent to validate voluntary tribal conveyances than § 17's express provision that such conveyances shall be invalid unless approved by the Secretary.¹³ The District Court concluded that the second clause of § 17 did not comport with prerequisites of the Nonintercourse Act because it "was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands." [App. 39]. The Court of Appeals affirmed the trial court's view that "§ 17 was intended as an extension to the Pueblos of the Nonintercourse Act, in prohibiting alienation of Pueblo lands except as Congress may provide in the future and as approved by the Secretary." [App. 5]. Contrary to the premises of the lower courts, this Court consistently has recognized the validity of conveyances pursuant to comparable provisions, and its decisions affirm a tribal power of alienation subject to the federal supervision designated in statutory restraints on alienation.

The Nonintercourse Act and its predecessor enactments contemplate, rather than prohibit, conveyances by tribes subject to statutorily designated federal supervision. This contemplation was incorporated in the first Indian Nonintercourse Act, passed in 1790. Act of July 22, 1790, ch.

¹³ Neither the District Court nor the Court of Appeals explain why the Nonintercourse Act would have continuing effect notwithstanding the provisions of the Act of March 3, 1871, ch. 120, § 1, 16 Stat. 566, 25 U.S.C. § 71 (1982), which establishes that the intent of Congress in each subsequent enactment is controlling. See *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903).

33, § 4, 1 Stat. 137.¹⁴ While the legislative history of the 1790 Act is meager, President George Washington, one of its chief proponents, described the purpose of that Act in a speech to the Seneca Nation in December 1790:

But, your great object seems to be, the security of your remaining lands; and I have, therefore, upon this point, meant to be sufficiently strong and clear, that, in the future, you cannot be defrauded of your lands; that you possess the right to sell, and the right of refusing to sell, your lands; that, therefore, the sale of your lands, in future, will depend entirely on yourselves. But that, when you may find it for your interest to sell any part of your lands, the United States must be present, by their agent, and will be your security that you shall not be defrauded in the bargain you make.

American State Papers (Indian Affairs, Vol. I, 1832) 142; see F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts* 44 (1962). The language and legislative history of the Nonintercourse Act indicate that it did not modify these prior Indian lands policies. H.R. Rep. No. 474, 23rd Cong., 1st Sess. (1834); see *Munez v. Hoffman*, 422 U.S. 454, 470 (1975).

The attempt of the Court of Appeals to engraft upon the historic interpretation of federal restraints on alienation a rule that Congress may not authorize a conveyance by specifying a form of federal supervision applicable to the conveyance is unsupportable. Federal restraints on alienation of Indian lands follow the principle established during the period of discovery and colonization that the

¹⁴ Statutory recognition of tribal power to alienate subject to federal supervision over the conveyance was carried forward in additional "temporary" Nonintercourse Acts, Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469; Act of March 3, 1799, ch. 46, § 12; 1 Stat. 743, and in the first "permanent" Nonintercourse Act, Act of March 30, 1892, ch. 13, § 12, 2 Stat. 139.

"nation making the discovery [obtained] the sole right of acquiring the soil and of making settlements of it . . . [Discovery] gave the exclusive right to purchase, but did not found that right on a denial of the right of the [tribal] possessor to sell." *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 244 (1872); see also *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 573 (1823); see generally F. Prucha, *American Indian Policy* 31-45 (1962). Chief Justice Marshall's decision in *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 736-60 (1835), surveyed the legal history of restraints on alienation of Indian lands in the English and Spanish colonies and in the United States and found restraints on alienation under the three governments to be comparable. In rejecting the contention that a conveyance of Indian land was invalid because approved only by a local Spanish governor, and not by direct royal confirmation, this Court concluded that:

The Indian right to the lands as property was not merely of possession, that of alienation was concomitant; both were equally secured, protected and guaranteed by Great Britain and Spain, subject only to ratification and confirmation by the license, charter, or deed from the governor representing the king.

Id. at 759-60. The Indian Nonintercourse Acts did not alter these colonial rules; those Acts "recognized and enforced" them. *Jones v. Meehan*, 175 U.S. 1, 9 (1899).

Justice Van Devanter's decision for this Court in *United States v. Candelaria*, 271 U.S. 432, 442 (1926), found restraints on alienation held by that decision to have been imposed on Pueblo lands by the Act of February 27, 1851, 9 Stat. 582, to be comparable to the Spanish and Mexican rules allowing Pueblo conveyances with governmental approval:

Thus it appears that Congress in imposing a restriction on the alienation of those lands as we think it did, was but continuing a policy which prior governments had deemed essential to the protection of such lands.

See, e.g., *Chouteau v. Moloney*, 57 U.S. (16 How.) 203, 207 (1853) (Spanish colonial law); *United States v. Pico*, 72 U.S. (5 Wall.) 536, 540 (1867) (Mexican colonial law). Thus, § 17's provision for supervision of Pueblo conveyances by a statutorily designated federal official fully comports with historic requirements applicable to restraints on alienation. The Nonintercourse Act confirms this proposition because the treaties and conventions by which it authorized tribes to convey their lands were not enactment of the full Congress, but agreements made by a representative of the President with the advice and consent only of the Senate. See F. Cohen, *Federal Indian Law* 39 (Univ. of N.M. Reprint, 1942 ed.).¹⁵

This Court consistently has recognized that statutes affirmatively imposing a restraint upon alienation give rise to valid title upon satisfaction of the stated condition. *Pickering v. Lomax*, 145 U.S. 310 (1892), held valid a deed granted pursuant to a treaty provision comparable to the second clause of § 17, which stated:

The tracts of land herein stipulated to be granted shall never be leased or conveyed by the grantees, or their heirs, to any persons whatever, without the permission of the president of the United States.

145 U.S. at 311. This Court's interpretation of that treaty provision strongly supports the administrative construction of § 17:

The object of the proviso was not to prevent the alienation of lands *in toto*, but to protect the Indian against the improvident disposition of his property, and it will be presumed that the president, before

¹⁵ As this Court concluded upon review of the Nonintercourse Acts,

It is well settled that a good title to parts of the lands of an Indian tribe may be granted to individuals by a treaty between the United States and the tribe, without any act of Congress, or any patent from the Executive authority of the United States.

Jones v. Meehan, 175 U.S. 1, 10 (1899).

affixing his approval, satisfy himself that no fraud or imposition had been practiced upon the Indian when the deed was originally obtained.

145 U.S. at 316. See also *Lomax v. Pickering*, 173 U.S. 26 (1899); *Smith v. Stevens*, 77 U.S. (10 Wall.) 321 (1870).¹⁶

For nearly two centuries, and until the decisions under review, courts have uniformly considered that statutes imposing a restraint on alienation imply the validity of conveyances rendered upon satisfaction of the restraint. The engrafting by the decision below of an additional requirement that Congress more affirmatively authorize the conveyance would unquestionably cloud countless outstanding titles. The decision below should be reversed to correct this fundamental misapprehension of the nature of federal restraints on alienation and of the Pueblo Lands Act and, further, to prevent unwarranted clouding of long-settled titles.

II. THE TENTH CIRCUIT OPINION IGNORES CONGRESSIONAL INTENT THAT DECREES ENTERED IN PUEBLO LANDS ACT QUIET TITLE SUITS BE FINAL AND PRECLUSIVE.

Policies of finality underlying the Pueblo Lands Act and the *res judicata* doctrine require that orders of dis-

¹⁶ The Court of Appeals' decision may cloud numerous other titles resting upon statutory authority similar to § 17. Statutes pertaining to lands of the Five Civilized Tribes, whose fee-owned lands have been held subject to restraints on alienation similar to those applicable to Pueblos, see *United States v. Sandoval*, 231 U.S. at 28, are strikingly similar to § 17. Act of May 27, 1908, § 9, 35 Stat. 312 (reproduced, App. 50a); Act of July 2, 1945, 59 Stat. 313 (reproduced, App. 51a); see also Act of February 27, 1925, § 3, 43 Stat. 1008 (Osage Tribe) (reproduced, App. 52a). The efficacy of such provisions has been recognized. *Tiger v. Western Investment Co.*, 221 U.S. 286, 308-09 (1911); *United States v. City of McAlester, Oklahoma*, 604 F.2d 42, 47 (10th Cir. 1979); *Tiger v. Sellers*, 145 F.2d 920, 923 (10th Cir. 1944). The Nonintercourse Act model has also been employed for other purposes. See Act of September 1, 1937, § 10, 50 Stat. 900 (restraint on alienation of Indian-owned reindeer).

missal, such as the May 31, 1928 order of dismissal ("Order of Dismissal") dismissing claims against Mountain Bell in *United States as Guardian of the Pueblo of Santa Ana v. Brown*, No. 1814 in Equity (D.N.M. 1927) ("United States v. Brown"), bar the present action by the Pueblos.¹⁷ The parties' agreement as to the conditions upon which dismissal of the Pueblo Lands Act quiet title suit would be entered, resulting in the United States' filing of its motion to dismiss and entry of the Order of Dismissal, was intended to effect a final resolution of the same claims between the same parties or their privies as are asserted in the present case.¹⁸ Failure to accord preclusive effect to the Order of Dismissal conflicts with Congress' intent that valid non-Indian title be confirmed by consent decrees in Pueblo Lands Act quiet title actions that would have "the effect of a deed of quit-claim as against the United States and said Indians . . .". Pueblo Lands Act § 5 [App. 25a]. Finally, the opinion below erroneously disregards that the numerous orders of dismissal recognizing the validity of rights-of-way acquired by virtue of § 17 establish a rule of property conclusive as to the confirmed titles.

A. The Tenth Circuit Failed to Accord the Consent Decree Preclusive Effect in Accordance with the Intention of the Parties.

The opinion below erred in characterizing the Order of Dismissal as a voluntary "dismissal without prejudice"

¹⁷ Like Mountain Bell, AT&SF was dismissed from a number of Pueblo Lands Act quiet title actions when, after negotiations with the United States (acting on behalf of the Pueblos) and the acquisition by AT&SF and approval by the Secretary of § 17 rights-of-way, the parties concluded that AT&SF's "rights and title . . . are valid . . .". See, e.g., *United States as Guardian of the Pueblo de Acoma v. Arvizo*, No. 2079 in Equity (D.N.M., decree entered May 14, 1931).

¹⁸ The opinion below did not deny that the present action involves the same claims between the same parties as did the earlier action; rather, the court based its decision on its conclusion that there was no "final judgment in the first suit." [App. 10a].

rather than as a consent decree. The Tenth Circuit failed to recognize that the preclusive effect of the Order of Dismissal is derived from the contractual agreement of the parties, not from the technical characterization of the form of dismissal. See *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975).

The Tenth Circuit does not dispute that the Order of Dismissal was entered in compliance with the agreement between the parties that Mountain Bell would acquire good and sufficient title under § 17 satisfactory to the United States and the United States would, therefore, dismiss its quiet title suit as against Mountain Bell.¹⁹ [J.A. 64-69]. Consequently, the Order of Dismissal constitutes a consent decree because it "represents an agreement between the parties settling the underlying dispute and providing for the entry of judgment in a pending . . . action." James, *Consent Judgments as Collateral Estoppel*, 108 U. Pa. L. Rev. 173, 175 (1959). The Tenth Circuit erred in failing to accord that consent decree the preclusive effect intended by the parties.

The opinion below further errs in relying on the observation that the consent decree in *United States v.*

¹⁹ That the Order of Dismissal was entered pursuant to the agreement of the parties was established in the record before the District Court by correspondence between the counsel for the United States and Mountain Bell. [J.A. 64-69]. In a March 10, 1928, letter to counsel for Mountain Bell, Mr. George Fraser, Special Assistant to the Attorney General, wrote: "I wish to take the bill *pro confesso* against various defendants who have not appeared, but will not do so as against your company if satisfied that its title will presently be perfected." [J.A. 65]. Subsequently, Mountain Bell obtained Secretarial approval, thereby perfecting its title. [J.A. 38, 65-67]. In response, Mr. Fraser wrote: "Thank you for . . . informing me that your conveyance from the Pueblo of Santa Ana has been approved by the Secretary of the Interior. I have pleasure in enclosing herewith copy of order of dismissal as against your company just entered by the Federal Court in this suit." [J.A. 67-68]. The decree thus entered reflected the intention to establish Mountain Bell's title as valid: it recited that Mountain Bell had obtained "good and sufficient title" under § 17. [J.A. 37].

Brown "indicates neither the Court's consideration nor approval of the [consent] agreement . . . [T]here is no showing that the Court was given a copy of the agreement. There were no findings of fact or conclusions of law." [App. 11a].²⁰ This analysis ignores that "it is inappropriate to search for the 'purpose' of a consent decree and construe it on that basis. The *decree* itself cannot be said to have a purpose; rather the *parties* have purposes" *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 235 (1975), citing *United States v. Armour & Co.*, 402 U.S. 675, 681-82 (1971) (emphasis in original). In this case, the "purpose" of the parties to the consent decree was to establish conclusively the validity of Mountain Bell's rights-of-way. The decisions of this Court required the courts below to give effect to that intention.

B. The Pueblo Lands Act Contemplates That Consent Decrees Be Entered To Confirm Non-Indian Titles Which The United States Determined Were Valid After Commencement of Suit.

The Pueblo Lands Act required that quiet title suits filed by the United States on behalf of Pueblos be all-encompassing and that adjudications in those suits finally determine all non-Indian claims "of any kind whatsoever" to Pueblo lands. Pueblo Lands Act § 1 [App. 22a]. The Senate hearings make clear that Congress contemplated that consent decrees would be entered in "perhaps 90 percent of these adverse claims that can be recognized without litigation" Senate Hearings 102-03 (Statement of Sen. Jones) [App. 41a]; see also *Senate Hearings* 102-03, 242 (Statements of Sen. Lenroot, Com-

²⁰ The entry of "findings of fact or conclusions of law" is not material to the order's *res judicata* effect. "It is a misconception of *res judicata* to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation." *Angel v. Bullington*, 330 U.S. 183, 190 (1947).

missioner of Indian Affairs, Burke, and Mr. Francis Wilson, Pueblo representative) [App. 41a]. Those statements reflect Congress' intention that, where claims were made by the United States which could be resolved without further litigation, the validity of the claimants' title should be confirmed by consent decree entered in the quiet title suits:

Senator Lenroot (Chairman of the Sub-committee on Indian Affairs):

The bill you have introduced provides for a decree in a single case.

Mr. Francis Wilson (a Pueblo representative):

That is correct, so there will be a *res judicata* there . . . I have had it in mind that there should be a *pro forma* adjudication of uncontested titles, just as long as there is going to be this same turmoil arising; and if it can be brought about so that it is finally adjusted it will be most desirable. If I had one of those titles today, I would want to be included in a suit, by disclaimer or consent to an agreed claim, even though I knew my title was absolutely good. I would want a decree as to that.

Senate Hearings at 242. [App. 44a-45a].

Congress' intent is further confirmed by the last provision in Section 5 of the Pueblo Lands Act. That provision states that a decree entered in favor of non-Indian claimants upon any grounds including, but not limited to, the statute of limitations defense "shall have the effect of a deed or quit-claim as against the United States and said Indians". [App. 25a]. Congress' express consideration of the role of consent decrees in the quiet title actions, and its inclusion in the Pueblo Lands Act of a provision confirming the finality of such decrees, require that consent decrees or judgments in Pueblo Lands Act suits be given preclusive effect.

C. In Providing For Quiet Title Suits Under the Pueblo Lands Act, Congress Chose A Procedure Intended to Ensure A Final Adjudication of Titles.

Congress' express provision for quiet title suits to resolve disputed claims to title reflects its intent that conflicting claims to Pueblo lands be finally resolved within the procedures prescribed by the Pueblo Lands Act. As this Court observed in *United States v. California & Oregon Land Co.*, 192 U.S. 355, 359 (1904), Congress' choice of a quiet title procedure indicates an intention to "settle the title once and for all." Like the water rights adjudication suit considered in *Nevada v. United States*, 103 S.Ct. 2906, 2925 (1983), quiet title actions under the Pueblo Lands Act were "no garden variety quiet title action[s]." They were "intended by all concerned, lawyers, litigants and judges, as . . . general all inclusive . . . adjudication suit[s] which sought to adjudicate all rights and claims . . ." *Id.* at 2913. The procedure chosen by Congress to accomplish that objective was, as it is today, "distinctively equipped to serve [the policies of *res judicata*]. *Id.* at 2918, n. 10.

Congress' providing that Pueblo Lands Act quiet title suits be resolved under the equity jurisdiction of United States District Courts further reflects an intention that the order entered by the court sitting in equity finally resolve the controversy, regardless whether a particular defendant's claims were fully adjudicated on the substantive merits or were dismissed by consent decree. "The fundamental principle of equity in relation to judgments is, that the court . . . frames its decree as to bar all future claims of any party before it which may arise from the subject matter, and which are within the scope of the present adjudication." 1 J. Pomeroy, *Equity Jurisprudence* § 1015 at 154 (5th Ed. 1941). As Congress was aware, courts of equity determined the rights of all parties before them and granted "the relief requisite to meet the ends of justice, in order to prevent a multiplicity of

suits" 1 J. Pomeroy, *Equity Jurisprudence* § 243 at 462 (5th Ed. 1941) (emphasis in original). The courts below erred in invalidating rights-of-way confirmed by decrees entered pursuant to the Pueblo Lands Act because preventing the multiplicity of suits now confronting both Mountain Bell and AT&SF was precisely the intended effect of Pueblo Lands Act §§ 3 and 5 [App. 24a-25a].

D. The Merits of the Prior Action Cannot Deprive A Consent Decree of Preclusive Effect.

The Tenth Circuit opinion incorrectly contends that the Order of Dismissal had no preclusive effect because an earlier judgment on the merits in favor of Mountain Bell assertedly would have been based on an erroneous application of law. This contention falls before this Court's holdings that, when a court has jurisdiction over the subject matter and the parties, its final decree "which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause." *Swift & Co. v. United States*, 276 U.S. 311, 324 (1928), citing *Nashville, Chattanooga & St. Louis Railway Co. v. United States*, 113 U.S. 261, 266 (1885).

The Tenth Circuit's exclusive reliance on *National Life & Accident Insurance Co. v. Parkinson*, 136 F.2d 506 (10th Cir. 1943), for its contention that "[c]ourts do not validate that which is invalid merely by consenting to a dismissal of the controversy over which its jurisdiction has been involved" [App. 11a], exposes the error in its holding. In *National Life*, the statute vesting jurisdiction in the court which entered the consent decree was declared unconstitutional, thereby depriving the district court of subject matter jurisdiction over the controversy. For the sole reason that the consent decree was entered by a court without jurisdiction, it was held not to bar a subsequent action. The *National Life* decision is, therefore, consistent with the holdings of this Court that consent decrees must be enforced where "the Court had

jurisdiction of the subject matter and of the parties. . ." *Swift & Co. v. United States*, 276 U.S. at 330.

The Court of Appeals' extension of the *National Life* holding to the present case, where no party contends that the Pueblo Lands Act failed to vest federal equity courts with jurisdiction over quiet title suits, is plainly in error because it "fails to distinguish an error in decision from the want of power to decide." *Swift & Co. v. United States*, 276 U.S. at 331. When a court with jurisdiction over the subject matter and the parties enters a consent decree, "even gross error in the decree would not render it void." *Id.* at 330. The district court in *United States v. Brown* had jurisdiction over the subject matter and the parties; the Tenth Circuit erred in not according the Order of Dismissal *res judicata* effect.

E. The Form Of The Order Of Dismissal Did Not Deprive It Of Preclusive Effect.

The courts below also erred in concluding that the Order of Dismissal was not a final judgment entitled to *res judicata* effect because it did not state whether it was with or without prejudice and assertedly must be presumed to be "without prejudice". [App. 10a]. That conclusion ignores the rules governing federal equity practice at the time the Order of Dismissal was entered and the rule that the intentions of the parties are controlling.²¹

²¹ The Court of Appeals' reliance on *In re Skinner & Eddy Corp.*, 265 U.S. 86, 91 (1924), and *Home Owners Loan Corp. v. Huffman*, 134 F.2d 314 (8th Cir. 1943), for this proposition is belied by a reading of those cases. Each involved situations where the plaintiff chose to dismiss its action expressly "without prejudice" and the defendant opposed the motion, and neither case involved a consensual dismissal. The cases do not address the equity court rules that "where no words of qualification appear in the order of dismissal, it is presumed to be rendered on the merits and is a bar to a subsequent bill for the same cause." See 1 R. Whitehouse, *Equity Practice* § 331 at 554 (1915); 2 T. Street, *Federal Equity Practice* § 1348 at 817 (1909).

Prior to the adoption of the Federal Rules of Civil Procedure in 1938, the rules pertaining to "bills" in equity were different from those applicable to actions at law. If the plaintiff in equity desired to dismiss an equitable action without being precluded in a subsequent suit, the action was required to have been dismissed expressly "without prejudice": "Where words of qualification, such as 'without prejudice' or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits." *Lyon v. The Perin & Gaff Manufacturing Co.*, 125 U.S. 698, 702 (1888), quoting *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 109 (1869). Contrary to the assertions underlying the Tenth Circuit opinion, the prevailing rules of equity practice at the time of entry of the Order of Dismissal mandate the conclusion that final decrees entered in equitable quiet title actions were intended to be dismissals with prejudice and bar subsequent actions.

F. The Orders Of Dismissal Established Rules of Property No Longer Subject To Judicial Reconsideration.

This Court's decision in *Nevada v. United States*, 103 S.Ct. 2906 (1983), confirms principles which squarely reject the holdings below. First and paramount, this Court determined in that case that the policies of *res judicata* are particularly applicable, and specifically bind Indian tribes, when they concern final decrees entered decades ago which confirm interests in property; indeed, "[t]he policies advanced by the doctrine of *res judicata* perhaps are at their zenith" in such cases. *Nevada v. United States*, 103 S.Ct. at 2918, n. 10. Those principles of finality apply to an Indian tribe in actions in which it was represented by the United States regardless whether

it had the opportunity to intervene, was a party, or alleges a conflict of interest.²² *Id.* at 2916.

Just as in the quiet title suit adjudicating water rights in *Nevada v. United States*, the dispute resolution policies underlying Pueblo Lands Act quiet title suits require that the Order of Dismissal be accorded *res judicata* effect. Numerous Pueblo Lands Act final decrees expressly affirming the validity of rights-of-way granted by a Pueblo and approved by the Secretary under § 17 establish the "rule of property" recognized in *Nevada v. United States*: These principles of according finality to conclusive adjudications of real property rights have long been recognized by this Court. See, e.g., *Arizona v. California*, 439 U.S. 419 (1983); *United States v. Title Insurance & Trust Co.*, 265 U.S. 472, 486 (1924); *Minnesota Mining Co. v. National Mining Co.*, 70 U.S. (3 Wall.) 332, 334 (1866). The Order of Dismissal should preclude this suit.

²² An examination of the Pueblo's claims reveals its apparent dissatisfaction to be with actions taken by the United States in approving the rights-of-way. Those contentions were required to have been timely litigated before the Indian Claims Commission or be forever barred. Indian Claims Commission Act of 1946, 60 Stat. 1049, formerly codified at 25 U.S.C. §§ 70-70u (1976); see also *Ogla'a Sioux Tribe v. United States*, 650 F.2d 140 (8th Cir. 1981), cert. denied, 455 U.S. 907 (1982). "If, in carrying out their role as representative, the Government violated its obligations to the [Pueblo], then the [Pueblo's] remedy is against the Government, 2925, n. 16 (1983). Like most Pueblos, the Pueblo of Santa Ana 2925, n.16 (1983). Like most Pueblos, the Pueblo of Santa Ana sued the United States before the Indian Claims Commission, *Pueblo of Santa Ana v. United States*, Indian Claims Commission Docket No. 137, and received compensation in that action. *Pueblo of Santa Ana v. United States*, 33 Ind. Cl. Comm. 16 (1974).

CONCLUSION

For the foregoing reasons, *amicus curiae*, The Atchison, Topeka and Santa Fe Railway Company, prays that the decision of the Court of Appeals for the Tenth Circuit be reversed.

Respectfully submitted this 23rd day of November, 1984.

GUS SVOLOS

GARY L. CROSBY

SANTA FE INDUSTRIES, INC.

224 South Michigan Avenue

Chicago, Illinois 60604

(312) 347-2283

JOHN R. COONEY

Counsel of Record

LYNN H. SLADE

JOHN S. THAL

WALTER E. STERN III

MODRALL, SPERLING, ROEHL,

HARRIS & SISK, P.A.

Post Office Box 2168

Suite 1000, Sunwest Building

500 Fourth Street, NW

Albuquerque, New Mexico 87103

Telephone: (505) 848-1800

*Attorneys for The Atchison,
Topeka and Santa Fe Railway
Company*

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 83-1220

PUEBLO OF SANTA ANA,
vs. *Plaintiff-Appellee,*

THE MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,
Defendant-Appellant.

THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY,
Amicus Curiae

PUEBLO DE ACOMA,
Amicus Curiae

PUBLIC SERVICE COMPANY OF NEW MEXICO,
Amicus Curiae

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

(D.C. No. 80-841-M Civ.)
(Filed May 14, 1984)

Scott E. Borg of Luebben & Hughes, Albuquerque, New Mexico, for Plaintiff-Appellee.

Kathryn Marie Krause, Denver, Colorado (Stuart S. Gunckel, Denver, Colorado, with her on the brief) for Defendant-Appellant.

Gary Crosby, Santa Fe Industries, Inc., Chicago, Illinois and John R. Cooney, Lynn H. Slade, John S. Thal and Walter E. Stern, III of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, filed briefs on behalf of Amicus Curiae The Atchison, Topeka and Santa Fe Railway Company. Public Service Company of New Mexico joined in the Amicus Briefs of The Atchison, Topeka and Santa Fe Railway Company.

Arturo G. Ortega of Ortega & Snead, P.A., Albuquerque, New Mexico and Peter C. Chestnut of Albuquerque, New Mexico, filed a brief on behalf of Amicus Curiae of Pueblo de Acoma.

Before McWILLIAMS BREITENSTEIN and LOGAN,
Circuit Judges.

BREITENSTEIN, Circuit Judge.

This is an interlocutory appeal from the United States District Court for the District of New Mexico which we permitted to be filed. The court granted partial summary judgment to the plaintiff-appellee, Pueblo of Santa Ana, and against the defendant-appellant, Mountain States Telephone and Telegraph Company, Mountain Bell. The dispute involves a right of way for a telephone and telegraph line across Pueblo lands. The trial court held in favor of the Pueblo and Mountain Bell appeals. We affirm.

The Pueblo was the owner of a trace of land situated, in New Mexico which was a part of the El Ranchito

Grant. In November, 1927, the United States pursuant to the Pueblo Lands Act, 43 Stat. 636, filed an action in the federal district court for the district of New Mexico entitled United States as Guardian of the Pueblo of Santa Ana v. Brown, No. 1814 Equity (D.N.M. 1928), seeking to quiet title to this tract in the Pueblo. Mountain Bell was party to that suit. During the course of that litigation, the Pueblo entered into a right-of-way agreement with Mountain Bell, dated February 23, 1928, granting an easement to construct, maintain, and operate a telephone and telegraph line, the same line that is in controversy here. Acting pursuant to § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636, 641-642, the Secretary of the Interior approved the agreement. The United States then moved to have Mountain Bell dismissed from the action on the ground that it had obtained title to the right of way through the easement agreement. In granting this motion, the court noted that it appeared "that since the institution of this suit said defendant has secured good and sufficient title to the right of way and premises in controversy. . . ."

In the present action Mountain Bell argues that it obtained a valid right of way across the Pueblo's land in 1928 and under § 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636. It argues further that the Pueblo's claims are barred by the 1928 dismissal of the case involving the same parties and issues. On these grounds, Mountain Bell moved for summary judgment that no trespass existed from 1928 to the present. The district court held, however, that § 17 did not authorize conveyance of lands by the Pueblo with the approval of the Secretary. The district court accepted the Pueblo's argument that § 17 was intended as a prohibition against the alienation of Pueblo lands except as Congress may provide in the future. Its requirements of Congressional authorization and Secretarial approval paralleled and were intended to extend to the Pueblo the Nonintercourse Act's requirement of a treaty or convention entered into

pursuant to the Constitution. See Acts of June 30, 1834, 4 Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177), and February 27, 1851, 9 Stat. 574, 587 § 7. The court further held that the Pueblo's claims were not barred by the 1928 dismissal order because that order did not constitute a final judgment.

Section 17 of the Pueblo Lands Act provides:

"No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, *or in any other manner except as may hereafter be provided by Congress*, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity *unless the same be first approved by the Secretary of the Interior.*" [Emphasis supplied.]

Mountain Bell challenges the argument of the Pueblo, upheld by the trial court, that § 17 was intended as an extension of the Pueblos of the Nonintercourse Act, in prohibiting alienation of Pueblo lands except as Congress may provide in the future and as approved by the Secretary. Mountain Bell argues that the first clause of § 17 requires Congressional approval for condemnations and other similar takings of Pueblo lands and that the second clause authorizes a pueblo to alienate its lands if it obtains Secretarial approval. Analysis of these arguments requires an examination of the language, the historical background, the legislative history, and the administrative history of the Act.

The Nonintercourse Act required a treaty or convention to alienate Indian lands, Act of June 30, 1834, 4

Stat. 729, 730 § 12 (codified at 25 U.S.C. § 177). The Act of February 27, 1851, 9 Stat. 574, 587 § 7, extended all laws then in force regulating trade and intercourse with the Indian tribes to include Indian tribes in the Territory of New Mexico.

In *State of New Mexico v. Aamodt*, 10 Cir., 537 F.2d 1102, cert. denied 429 U.S. 1121, a water rights case, we reviewed the historical background of the controversy, pp. 1105 and 1109, and pointed out, p. 1105, that the efforts of federal officials to protect the Pueblos' property were frustrated by the New Mexico territorial courts which held that the Pueblos were outside the protection of federal laws. This rationale was upheld by the Supreme Court in *United States v. Joseph*, 94 U.S. 614.

We noted, at p. 1105, that the 1910 New Mexico Enabling Act, 36 Stat. 557, 558-559, defined "Indian country" to include "all lands now owned or occupied by the Pueblo Indians" and stated that such lands are "under the absolute jurisdiction and control of the Congress of the United States." The constitutionality of this provision was upheld in *United States v. Sandoval*, 231 U.S. 28, which specifically overruled *United States v. Joseph*. The Court said, *Id.* at 39, that,

"The people of the pueblos, although sedentary rather than nomadic in their inclinations, and disposed to peace and industry, are nevertheless Indians in race, customs, and domestic government."

The Court noted that the United States has treated the pueblos "as requiring special consideration and protection, like other Indian communities." *Id.*

Because in the *Joseph* decision the Supreme Court decided that the Pueblo lands were not subject to the protective laws earlier passed by Congress, non-Indians were free to acquire Pueblo lands. The validity of titles so acquired became questionable when in *Sandoval* the Court held that the protective federal statutes did apply

and presumably always had applied. Congress responded with the passage in 1924 of the Pueblo Lands Act, 43 Stat. 636. The Act established a "Pueblo Lands Board" to investigate the Pueblo lands and determine those cases in which the Indian title should be extinguished. The United States as guardian of the Pueblos was required to institute quiet title actions to settle adverse claims to Pueblo lands. Non-Indians claiming title could plead adverse possession and the statute of limitations, defenses not ordinarily available against the United States.

In 1926, the Court in *United States v. Candelaria*, 271 U.S. 432, reaffirmed *Sandoval*. In so doing, it said after referring to the 1834 and 1851 acts, p. 441:

"While there is no express reference in the provision to the Pueblo Indians, we think it must be taken as including them. They are plainly within its sight, and, in our opinion, fairly within its words, 'any tribe of Indians.'"

We echoed this language, noting the application of the Nonintercourse Act to the Pueblo Indians in *Aamodt*, supra. In *Plains Elec. Gen. & Tr. Co-op v. Pueblo of Laguna*, 10 Cir., 542 F.2d 1375, 1376, we cited *Candelaria* as authority for the statement that "Lands of the Pueblos cannot be alienated without the consent of the United States." In *United States v. University of New Mexico*, No. 83-1238, 10 Cir. opinion filed April 9, 1984, we noted that Congress extended the Nonintercourse Act to the Pueblos in 1851 and said that § 17 of the Pueblo Lands Act of 1924 "reaffirmed that the Pueblos and their lands were fully under the guardianship of Congress and the protection of the Nonintercourse Act." Slip Op. at 7. In so doing we noted the following statement in *United States v. Chavez*, 290 U.S. 357, 362:

"[T]he status of the Indians of the several Pueblos in New Mexico is that of dependent Indian tribes under the guardianship of the United States and that

by reason of this status they and their lands are subject to the legislation of Congress enacted for the protection of tribal Indians and their property."

Thus we have three times held that the Pueblo's lands were under the protection of the Nonintercourse Act.

Mountain Bell argues that § 17 was not a grant of power to the Pueblos to convey their lands, but instead reaffirmed the power of alienation which already existed in the Pueblos, and implemented the government's guardianship role by restricting that power. This view is insupportable. The House Report on the Pueblo Lands Act, reprinting the language of the Senate Report, states:

"It was only by the decision of the case of the *United States v. Sandoval* (213 U.S. 28) that the Supreme Court of the United States definitely established the principle that these Indians were wards of the Government. . . .

Up to the time of the decision of the *Sandoval* case in 1913, it had been assumed by both the Territorial and State courts of New Mexico, that the Pueblos has [sic] the right to alienate their property. From earliest times also the Pueblos had invited Spaniards and other non-Indians to dwell with them, and in many cases Pueblos and individual Indians attempted to convey lands to non-Indians which under the decision of the *Sandoval* case they were not competent to do." H.R. Rep. No. 787, 68th Cong., 1st Sess. 2 (1924).

It seems clear, then, that if § 17 is not a delegation of power, the 1928 agreement is void.

The terms of § 17 do not provide such authorization to the pueblos to grant their lands. The two clauses of § 17 of the Pueblo Lands Act are joined by the conjunctive "and." To us that means exactly what it says. No aliena-

tion of the Pueblo lands shall be made "except as may hereafter be provided by Congress" and no such conveyance "shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior." Two things are required. First, the lands must be conveyed in a manner provided by Congress. Second, the Secretary of the Interior must approve. As to the first, at the time of the agreement between the Pueblo and Mountain Bell, Congress had provided nothing. Hence, the first condition was not met. The fact that Congress had provided no method makes the approval of the Secretary meaningless. The operation of the second clause depends on compliance with the first clause.

Mountain Bell argues that to give the first clause the meaning which we have approved runs contrary to 25 U.S.C. §§ 311-322 providing among other things for rights of way for telephone and telegraph lines. The answer is that Congress did not extend the application of these statutes to the Pueblo Indians of New Mexico until the Act of April 21, 1928, see 25 U.S.C. § 322, which was after the Secretary had given his approval to the agreement, with Mountain Bell. The Secretary's approval, given on April 13, 1928 says that it was done pursuant to the provisions of § 17 of the Act of June 7, 1924.

Mountain Bell makes much of the legislative history of the Pueblo Lands Act. We have examined the Senate and House reports of the hearings. Hearings before a subcommittee of the Committee on Public Lands and Surveys, on S.3865 and 4223, 67th Cong. 4th Session; Hearings before the Committee on Indian Affairs on H.R. 13452 and H.R. 13674, 67th Cong. 4th Session. We find that the most that can be said about them is that they are ambiguous and add nothing to the express language of the statute. If it be conceded that the statute is ambiguous, and we do not feel that it is, then as said in *Bryan v. Itasca County*, 426 U.S. 373, 392:

"... we must be guided by the 'eminently sound and vital cannon,' *Northern Cheyenne Tribe v. Hollowbreast* 425 U.S. 649, 655 n.7 (1976), that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.'"

See also *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 354.

Mountain Bell says that the administrative construction of the statute supports its contentions. Although the construction put on a statute by the agency charged with administering it is entitled to deference, the courts are the final authorities on statutory construction and are not obliged to accept an administrative construction which they deem inconsistent with a statutory mandate or frustrates congressional policy. *SEC v. Sloan*, 436 U.S. 103, 117-118; and *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-746. See also *Plateau, Inc. v. Dept. of Interior*, 10 Cir., 603 F.2d 161, 164. In our opinion, the administrative actions on which Mountain Bell relies violate the plain congressional intent of § 17 of the Pueblo Lands Act.

Mountain Bell argues that the Pueblo's claim is barred by the doctrines of *res judicata* and collateral estoppel because of the dismissal of Mountain Bell as a defendant in *United States v. Brown*, supra, No. 1814 Equity (D.N.M. 1928). The *Brown* suit was filed in November of 1927, under the Pueblo Lands Act of June 7, 1924. Mountain Bell neither entered an appearance in the case nor filed an answer. On April 13, 1928, the Assistant Secretary of the Interior approved an agreement between the Pueblo and Mountain Bell for a telephone lines easement across the Pueblo lands. The approval reads "APPROVED, pursuant to the provisions of Section 17 of the Act of June 7, 1924 (43 Stat. L. 636)."

The United States then filed a motion in the Brown case asking the dismissal of Mountain Bell and, as ground for the motion it alleged that,

"subsequent to the institution of this suit said defendant has obtained a deed from the Pueblo of Santa Ana approved April 13, 1928, by the Secretary of the Interior in accordance with Section 17 of the Pueblo Lands Act of June 7, 1924, and that thereby said defendant has obtained, for an adequate consideration, good and sufficient title to the right of way in controversy herein between plaintiff and said defendant."

In its order granting the motion the trial court echoed the language of the motion. It failed to state whether it was with or without prejudice and it was, therefore without prejudice. See *Ex Parte Skinner and Eddy Corp.*, 265 U.S. 86. *Home Owners' Loan Corp. v. Huffman*, 8 Cir., 134 F.2d 314, 317, says that Rule 41 Fed.R.Civ.P., which adopted this standard, followed long established practice in federal courts and is intended to clarify and make definite that practice.

Mountain Bell argues that the three requirements for application of res judicata or collateral estoppel are (1) identity of causes of action, (2) identity of the parties or privity, and (3) a final judgment in the first suit. Only the third need be considered. Mountain Bell says that a voluntary dismissal may be a final judgment for res judicata purposes if it addresses and resolves the issue originally in dispute. In making this argument, Mountain Bell relies largely on cases wherein a consent decree was issued. A consent judgment may assume any of several forms. When entered as a decree of dismissal with prejudice, the judgment is generally preclusive. See *Bradford v. Bonner*, 5 Cir., 665 F.2d 680, 682 and *Bloomer Shippers Ass'n v. Illinois Central Gulf Railroad Co.*, 7 Cir. 655 F.2d 772, 777.

The dismissal order in Brown indicates neither the court's consideration nor approval of the agreement. The court said only that it appeared to the court that the defendant had secured good and sufficient title by a deed from the Pueblo approved by the Secretary of the Interior "in accordance with the provisions of Section 17 of the Pueblo Lands Act of June 7, 1924." There is no showing that the court was given a copy of the agreement. There were no findings of fact or conclusions of law.

In *National Life & Accident Insurance Co. v. Parkinson*, 10 Cir., 136 F.2d 506, 509, we said:

"Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked."

We have held that the agreement is invalid under § 17 in the absence of congressional action. Mountain Bell would have us hold that the agreement was valid under the action of the district court in dismissing the case without prejudice and making no effort to decide the validity of the agreement. We reject the arguments of res judicata and collateral estoppel.

Pursuant to Rule 56, Fed.R.Civ. P., Mountain Bell moved for a partial summary judgment dismissing the plaintiff's claims for trespass for the period 1928 to date alleging that it is not a trespasser by reason of the April 13, 1928, approval of the Secretary of the Interior. The trial court denied the motion saying, I R. p. 43:

"The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied."

As the Pueblo points out, the commentators generally agree that where there is no genuine issue of fact, the court may enter summary judgment for either party, whether or not such party has made a motion therefor. See 10A Wright, Miller & Kane, Federal Practice and

12a

Procedure: Civil 2d § 2720, at 29-30, "the weight of authority is that summary judgment may be rendered in favor of the opposing party even though he has made no formal cross-motion under Rule 56."

Mountain Bell's motion does not address the claimed trespass prior to 1928, and hence the plaintiff's claim for damages for the period prior to 1928 remains as issue.

Affirmed.

13a

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

No. 80-841-M Civil

PUEBLO OF SANTA ANA,
Plaintiff,

vs.

THE MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

MEMORANDUM OPINION AND ORDER

(Filed June 2, 1982)

This matter arises on cross motions for summary judgment by defendant, Mountain States Telephone and Telegraph Co., (Telephone) and plaintiff Pueblo of Santa Ana (Pueblo). The parties agree and I find that there are no material issues of fact as to the issues presented. The plaintiff is entitled to judgment as a matter of law as to those issues.

The Pueblo seeks damages from the defendant for a trespass which began in 1907 and has continued to the present. The trespass is a telephone and telegraph line constructed by defendant's predecessor across lands held by the Pueblo in fee simple but subject to federal restraints against alienation. Telephone argues it obtained a valid right of way across the Pueblo's land in 1928 pursuant to § 17 of the Pueblo Lands Act of June 7, 1924.

43 Stat. 636. Telephone also argues plaintiff's claims are barred by the judgment in *United States as Guardian of the Pueblo of Santa Ana v. Brown*, No. 1814 Equity (D.N.M. 1928). The issues presented are: (1) Did Congress, in § 17 of the Pueblo Lands Act, intend to grant to the Pueblos of New Mexico authority to alienate their land? (2) Are Santa Ana's claims barred by the judgment in *U.S. v. Brown*?

THE PUEBLO LANDS ACT

Section 17 of the Pueblo Lands Act provides:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as herein before determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity and unless the [sic] be first approved by the Secretary of Interior.

It is not disputed that the Secretary, on April 12, 1928, approved the right of way granted to Telephone by the Pueblo. Pueblo argues, however, that Telephone could not obtain a valid right of way pursuant to § 17 because § 17 was an extension of the Indian Non-Intercourse Act to the Pueblos of New Mexico, and not a grant of authority to the Pueblos and the Secretary to alienate Pueblo lands. Pueblo maintains § 17's prohibition against the alienation of Pueblo lands except as Congress may provide in the future and its requirement of Secretarial approval closely parallels and was intended to extend to the Pueblos the Non-Intercourse Act's requirement of a treaty or conven-

tion negotiated by an officer of the United States to alienate Indian lands. Acts of June 30, 1834, 4 Stat. 730 § 12, (codified at 25 U.S.C. 177), and February 27, 1851, 9 Stat. 587. Telephone argues the first clause of § 17 refers to condemnation or other similar takings which Congress may authorize in the future and the second clause was intended by Congress to allow grants of Pueblo lands by the Pueblos so long as the approval of the Secretary was first obtained. A brief discussion of the circumstances surrounding the enactment of the Pueblo Lands Act is necessary to an understanding of the issue.

The Pueblo Lands Act was a congressional response to the confusion created by the Supreme Court's conflicting decisions in *U.S. v. Joseph*, 94 U.S. 614 (1876); *U.S. v. Sandoval*, 231 U.S. 28 (1913); and *U.S. v. Candelaria*, 271 U.S. 432 (1925). In *Joseph*, the issue was whether the Pueblos of the Rio Grande Valley of New Mexico were afforded protections under the Indian Non-Intercourse Acts. Acts of June 30, 1834, 4 Stat. 730, § 12 and February 27, 1851, 9 Stat. 587. The Act of June 30, 1834, among other things, forbade the transfer of Indian lands unless the grant "be made by treaty or convention entered into pursuant to the Constitution." Section 12 also requires that the treaty or convention be negotiated by an officer of the United States. The Act of February 27, 1851 extended the protections of the June 30, 1834 Act to the Indian Tribes of the newly acquired Territory of New Mexico. However, the Court in *Joseph* held the Acts did not apply to the Pueblos of New Mexico because, unlike other Indian Tribes, Pueblo land was owned in fee simple and also because the Pueblo Indians were sophisticated such that federal protections were not required. After the decision in *Joseph*, the United States made no effort to prevent encroachment on Pueblo lands.

However, the Court again had the opportunity to consider the status of the Pueblos in *Sandoval* and *Candelaria*. In *Sandoval* the Court held that the Pueblo Indians

were ethnically and historically "Indians" and that Congress had the power to define them as such in the New Mexico Statehood Enabling Act of June 20, 1910, 36 Stat. 557. In *Candelaria*, a quiet title action, the Court was again presented with the question of the applicability of the Indian Non-Intercourse Acts to the Pueblos. Acts of June 30, 1834 and February 27, 1851. In holding that the Pueblos were afforded the protections of the Non-Intercourse Acts, the Court stated,

While there is no express reference in the provision (the provision prohibiting (sic) settlement on Indian Lands in the Act of 1834) to Pueblo Indians, we think it must be taken as including them. They are plainly within its spirit and, in our opinion, fairly within its words 'any tribe of Indians.' Although sedentary, industrious and disposed to peace, they are Indians in race, custom and domestic government, always have lived in isolated communities, and are a simple, uninformed people, ill prepared to cope with the intelligence and greed of others." 271 U.S. at 442.

The decision in *Candelaria* created uncertainty in New Mexico for those who had settled on Pueblo lands between the time of the decisions in *Joseph* and *Candelaria*. In *Candelaria*, the Court held that the Pueblos were protected by the Non-intercourse Acts and had been since the Acts were extended to the Pueblos of New Mexico in 1851. Therefore, those who had settled on Pueblo lands in good faith since 1851, were in violation of the Non-Intercourse Acts. The Pueblo Lands Act was Congress' response to this dilemma.

The Act created the Pueblo Lands Board and charged it with the responsibility of investigating title to Pueblo lands and filing actions in Federal District Court to recover certain lands of the Pueblos. Section 3. Other Pueblo lands, where the settlers could establish title un-

der state or territorial law or where they could comply with the statute of limitations contained in Section 4 of the Pueblo Lands Act, were to be awarded to the settlers. Section 5. The Pueblos were to be compensated for property lost to the non-Indian settlers. Section 6.

In the Pueblo Lands Act, Congress was attempting to work an equitable solution to the thorny problem created by uncertainty as to the status of the Pueblo Indians. I am convinced that Congress was also, in § 17, reaffirming through congressional enactment what the Supreme Court decided in *Candelaria*: The Pueblos are Indians and wards of the federal government and Congress intended they be afforded the protections of the Indian Non-Intercourse Acts.

The Tenth Circuit reached a similar conclusion in *Plains Elec. Gen. and Tr. Co-Op. v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir. 1976). In *Plains*, the issue was whether Congress had repealed, by implication, a general Pueblo land condemnation statute by its subsequent enactment of a specific, comprehensive scheme for the acquisition of rights of way across Pueblo lands. In holding there had been a repeal, the Court stated,

The history of these statutes (26 U.S.C. §§ 311-328; statutes providing for the acquisition of rights of way across Pueblo lands) reflects an effort to overcome the problems caused by the unique nature of Pueblo Indian land holdings and to provide them with the same protections given the lands of other Indians. The United States Supreme Court has held that Pueblo lands are subject to such protection, *United States v. Candelaria*, [271 U.S. 432 (1925)] and *United States v. Sandoval*, [231 U.S. 28 (1913)], and the intent of Congress to provide such protection cannot be doubted.

Accordingly, I will determine whether Congress intended § 17 to grant to the Pueblos authority to alienate their

lands with Secretarial approval, by determining whether such a grant of authority is consistent with the Indian Non-Intercourse Acts, and federal Indian policy generally.

The Constitution rests the power to deal with Indian tribes in the Congress. Included in that power is the exclusive right to extinguish Indian titles. Act of June 30, 1834, 4 Stat. 730; *U.S. v. Santa Fe Pacific Rlwy Co.*, 314 U.S. 339, 347 (1941). Congress' intent to authorize alienation of Indian lands must be clear and express. *Chippewa v. U.S.*, 307 U.S. 1 (1939). Doubtful expressions of congressional intent to authorize alienation of Indian land must be resolved in favor "[of the Indian . . . who is] wholly dependent on its [the federal government's] protection and good faith." *U.S. v. Santa Fe Pacific Rlwy Co.*, at 354. Although Congress may delegate its power, the unilateral action of an officer of the Executive Branch cannot alienate land. Whether Congress intended to delegate its authority to alienate Indian lands must be determined against the "strong background of maintenance of congressional control." *Turtle Mountain Band of Chippewa Indians v. U.S.*, 490 F.2d 935, 946 (Ct. Claims 1974).

By the terms of § 17 of the Pueblo Lands Act, there is no authorization for the grant or sale of Pueblo lands. Although such authorization might be inferred from the Section's requirement of Secretarial approval, I decline to do so. The claimed authorization is not clear and express. Furthermore, it would be anomalous to conclude that Congress, having expressed its intention to afford the Pueblos the protection of other Indians, abandoned its objective and completely delegated its authority to the Secretary, with no restrictions, unlike other Indian Tribes. Such irrationality and arbitrariness should not be attributed to the Congress that was attempting to solve the problems created by the Supreme Court's erroneous deci-

sion in *Joseph*. See *Morton v. Mancari*, 417 U.S. 535, 548 (1974).

The construction of § 17 offered by the Pueblo is certainly more reasonable. The Secretary has adopted the construction offered by the Pueblo. 25 C.F.R. 121.22 provides:

Tribal Lands, Lands held in trust by the United States for an Indian Tribe. Lands owned by a tribe with federal restrictions against alienation and any other lands owned by an Indian Tribe may only be conveyed where specific statutory authority exists and then only with the approval of the Secretary unless the act of Congress authority sale provides that approval is unnecessary. (See 25 U.S.C. 177 [Act of June 30, 1834]).

Although the Secretary has not always construed the Act of June 30, 1834 and § 17 of the Pueblo Lands Act to require congressional authorization (apart from § 17) and the approval of the Secretary, as evidenced by the Secretary's approval of the right of way at issue in this case, the Secretary's differing constructions of § 17 illustrates my conclusion that § 17 was not a clear and express grant of authority to the Secretary and the Pueblos to alienate Pueblo lands.

RES JUDICATA AND COLLATERAL ESTOPPEL

Telephone also argues Pueblo's claim from 1928 to the present is barred by the judgment in *U.S. v. Brown*, No. 1814 Equity (D.N.M. 1928). *Brown* was brought by the United States as guardian of the Pueblo pursuant to § 4 of the Pueblo Lands Act to quiet title to Santa Ana Pueblo lands. In the course of the suit, before Telephone filed its answer, the United States moved to dismiss Telephone on the ground that Telephone had obtained a valid

right of way, the right of way at issue here. Dismissal was ordered the day the motion was filed and the order of dismissal did not state whether the dismissal was with or without prejudice. The dismissal is, therefore, without prejudice. Fed.R.Civ.P. 41; *Homeowners' Loan Corp. v. Huffman*, 134 F.2d 314, 317 (8th Cir. 1943).

Telephone argues that Pueblo's claims from 1928 are *res judicata* and that the Pueblo is collaterally estopped from relitigating the validity of the right of way at issue in this case. A final judgment on the merits is essential in order for an action to be *res judicata*. For collateral estoppel to apply, the factual issue must have been actually litigated and necessarily decided. Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* § 4406 at p. 45; *Craft v. Choate*, No. 81-1893 (10th Cir. Slip Opinion, April 5, 1982). There was no judgment on the merits in *Brown* and the validity of Telephone's right of way was not actually litigated or necessarily decided.

Telephone concedes that it was dismissed from the suit on the pretrial motion of the United States, but it maintains that the dismissal should be afforded the status of a judgment on the merits because of the Court's observation in the order of dismissal that "it appear[ed] to the court that since the institution of this suit, said defendant has secured good and sufficient title to the right of way and premises in controversy herein between plaintiff and said defendant by deed from the Pueblo of Santa Ana approved April 13, 1928 by the Secretary of Interior in accordance with the provisions of § 17 of the Pueblo Lands Acts of June 7, 1924."

I am not convinced that the court's observation as to the reasons the United States moved for dismissal should elevate the order of dismissal to the status of an order on the merits. Substance must govern over form. The order of dismissal in *Brown* was not an order on the

merits and the issue of the validity of Telephone's right of way was not actually litigated and necessarily decided. It is not uncommon for a court to state in its order of dismissal the reason plaintiff moved for the dismissal. Plaintiff's claims are not *res judicata* and the factual issues present in those claims are not precluded by collateral estoppel.

In conclusion, § 17 of the Pueblo Lands Act was intended by Congress to reaffirm the protections afforded the Pueblos under the Acts of June 30, 1834 and February 27, 1851. It was not intended to grant to the Pueblos and the Secretary *carte blanc* to alienate Pueblo lands for any reason. Plaintiff's claims are not barred by the judgment in *U.S. v. Brown*. The Pueblo shall recover damages from April 13, 1928 to the date the defendant's telephone and telegraph line was removed. Plaintiff's prayer for punitive damages is denied.

/s/ E. L. Mechem
United States District Judge

APPENDIX C

Pueblo Lands Act of June 7, 1924, Act of June 7, 1924, c. 331, 43 Stat. 636, as amended by Act of May 31, 1933, c. 45, § 7, 48 Stat. 111, provides:

1. That in order to quiet title to various lots, parcels, and tracts of land in the State of New Mexico for which claim shall be made by or on behalf of the Pueblo Indians of said State as hereinafter provided, the United States of America, in its sovereign capacity as guardian of said Pueblo Indians shall, by its Attorney General, file in the District Court of the United States for the District of New Mexico, its bill or bills of complaint with a prayer for discovery of the nature of any claim or claims of any kind whatsoever adverse to the claim of said Pueblo Indians, as hereinafter determined.

2. That there shall be, and hereby is, established a board to be known as 'Pueblo Lands Board' to consist of the Secretary of the Interior, the Attorney General, each of whom may act through an assistant in all hearings, investigations, and deliberations in New Mexico, and a third member to be appointed by the President of the United States. The board shall be provided with suitable quarters in the city of Santa Fe, New Mexico, and shall have power to require the presence of witnesses and the production of documents by subpoena, to employ a clerk who shall be empowered to administer oaths and take acknowledgements, shall employ such clerical assistance, interpreters, and stenographers with such compensation as the Attorney General shall deem adequate, and it shall be provided with such necessary supplies and equipment as it may require on requisitions to the Department of Justice. The compensation and allowance for travel and expenses of the member appointed by the President shall be fixed by the Attorney General.

It shall be the duty of said board to investigate, determine, and report and set forth by metes and bounds, illustrated where necessary by field notes and plats, the

lands within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico by any authority of the United States of America, or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise, title to which the said board shall find not to have been extinguished in accordance with the provisions of this Act, and the board shall not include in their report any claims of non-Indian claimants who, in the opinion of said board after investigation, hold and occupy such claims of which they have had adverse possession, in accordance with the provisions of section 4 of this Act: Provided, however, That the board shall be unanimous in all decisions whereby it shall be determined that the Indian title has been extinguished.

The board shall report upon each pueblo as a separate unit and upon the completion of each report one copy shall be filed with the United States District Court for the District of New Mexico, one with the Attorney General of the United States, one with the Secretary of the Interior, and one with the Board of Indian Commissioners.

3. That upon the filing of each report by the said board, the Attorney General shall forthwith cause to be filed in the United States District Court for the District of New Mexico, as provided in section 1 of this Act, a suit to quiet title to the lands described in said report as Indian lands the Indian title to which is determined by said report not to have been extinguished.

4. That all persons claiming title to, or ownership of, any lands involved in any such suit, or suits, may in addition to any other legal or equitable defenses which they may have or have had under the laws of the Territory and State of New Mexico, plead limitation of action, as follows, to wit:

(a) That in themselves, their ancestors, granted privies, or predecessors in interest or claim of interest,

they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed, under color of title from the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation, or adverse possession of the Territory or of the State of New Mexico, since the 6th day of January, 1902, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

(b) That in themselves, their ancestors, grantors, privies, or predecessors in interest or claim of interest, they have had open, notorious, actual, exclusive, continuous, adverse possession of the premises claimed with claim of ownership, but without color of title from the 16th day of March, 1889, to the date of the passage of this Act [June 7, 1924], and have paid the taxes lawfully assessed and levied thereon to the extent required by the statutes of limitation or adverse possession of the Territory or of the State of New Mexico, from the 16th day of March, 1899, to the date of the passage of this Act [June 7, 1924], except where the claimant was exempted or entitled to be exempted from such tax payment.

Nothing in this Act contained shall be construed to impair or destroy any existing right of the Pueblo Indians of New Mexico to assert and maintain unaffected by the provisions of this Act their title and right to any land by original proceedings, either in law or equity, in any court of competent jurisdiction and any such right may be asserted at any time prior to the filing of the field notes and plats as provided in section 13 hereof, and jurisdiction with respect to any such original proceedings is hereby conferred upon the United States District Court for the District of New Mexico with right of review as in other cases: Provided, however, That any contract entered into with any attorney or attorneys by the Pueblo

Indians of New Mexico, to carry on such litigation shall be subject to and in accordance with existing laws of the United States.

5. The plea of such limitations, successfully maintained, shall entitle the claimants so pleading to a decree in favor of them, their heirs, executors, successors, and assigns for the premises so claimed by them, respectively, or so much thereof as may be established, which shall have the effect of a deed of quit-claim as against the United States and said Indians, and a decree in favor of claimants upon any other ground shall have a like effect.

The United States may plead in favor of the pueblo, or any individual Indian thereof, as the case might be, the said limitations hereinbefore defined.

6. It shall be the further duty of the board to separately report in respect of each such pueblo—

(a) The area and character of any tract or tracts of land within the exterior boundaries of any land granted or confirmed to the Pueblo Indians of New Mexico and the extent, source, and character of any water right appurtenant thereto in possession of non-Indian claimants at the time of filing such report, which are not claimed for said Indians by any report of the board.

(b) Whether or not such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians. Seasonable prosecution is defined to mean prosecution by the United States within the same period of time as that within which suits to recover real property could have been brought under the limitation statutes of the Territory and State of New Mexico.

(c) The fair market value of said water rights and of said tract or tracts of land (exclusive of any improvements made therein or placed thereon by non-Indian

claimants) whenever the board shall determine that such tract or tracts of land or such water rights could be or could have been at any time recovered for said Indians by the United States by seasonable prosecution of any right of the United States or of said Indians, and the amount of loss, if any, suffered by said Indians through failure of the United States seasonably to prosecute any such right.

The United States shall be liable, and the board shall award compensation, to the pueblo within the exterior boundaries of whose lands such tract or tracts of land shall be situated or to which such water rights shall have been appurtenant to the extent of any loss suffered by said Indians through failure of the United States seasonably to prosecute any right of the United States or of said Indians, subject to review as herein provided. Such report and award shall have the force and effect of a judicial finding and final judgment upon the question and amount of compensation due to the Pueblo Indians from the United States for such losses. Such report shall ~~be~~ filed simultaneously with and in like manner as the reports hereinbefore provided to be made and filed in section 2 of this Act.

At any time within sixty days after the filing of said report with the United States District Court for the District of New Mexico as herein provided the United States or any pueblo or Indians concerned therein or affected thereby may, in respect of any report upon liability or of any finding of amount or award of compensation set forth in such report, petition said court for judicial review of said report, specifying the portions thereof in which review is desired. Said court shall thereupon have jurisdiction to review, and shall review, such report, finding, or award in like manner as in the case of proceedings in equity. In any such proceeding the report of the board shall be prima facie evidence of the facts, the values, and the liability therein set forth, subject, however, to be re-

butted by competent evidence. Any party in interest may offer evidence in support or in opposition to the findings in said report in any respect. Said court shall after hearing render its decision so soon as practicable, confirming, modifying, or rejecting said report or any part thereof. At any time within thirty days after such decision is rendered said court shall, upon petition of any aggrieved, certify the portions of such report, review of which has been sought, together with the record in connection therewith, to the United States Circuit Court of Appeals for the Eighth Circuit, which shall have jurisdiction to consider, review, and decide all questions arising upon such report and record in like manner as in the case of appeals in equity, and its decision thereon shall be final.

Petition for review of any specific finding or award of compensation in any report shall not affect the finality of any findings nor delay the payment of any award set forth in such report, review of which shall not have been so sought, nor in any proceeding for review in any court under the provisions of this section shall costs be awarded against any party.

7. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior who shall report to the Congress of the United States, together with his recommendation, the fair market value of lands, improvements appurtenant thereto, and water rights of non-Indian claimants who, in person or through their predecessors in title prior to January 6, 1912, in good faith and for a valuable consideration purchased and entered upon Indian lands under a claim of right based upon a deed or document purporting to convey title to the land claimed or upon a grant, or license from the governing body of a pueblo to said land, but fail to sustain such claim under the provisions of this Act, together with a statement of the loss in money value thereby suffered by such non-Indian claimants. Any lands

lying within the exterior boundaries of the pueblo of Nambe land grant, which were conveyed to any holder or occupant thereof or his predecessor or predecessors in interest by the governing authorities of said pueblo, in writing, prior to January 6, 1912, shall unless found by said board to have been obtained through fraud or deception, be recognized as constituting valid claims by said board and by said courts, and disposed of in such manner as lands the Indian title to which has been determined to have been extinguished pursuant to the provisions of this Act: Provided, That nothing in this section contained with reference to the said Nambe Pueblo Indians shall be construed as depriving the said Indians of the right to impeach any such deed or conveyance for fraud or to have mistakes therein corrected through a suit in behalf of said pueblo or of an individual Indian under the provisions of this Act.

8. It shall be the further duty of the board to investigate, ascertain, and report to the Secretary of the Interior the area and the value of the lands and improvements appurtenant thereto of non-Indian claims within or adjacent to Pueblo Indian settlements or towns in New Mexico, title to which in such non-Indian claimants is valid and indefeasible, said report to include a finding as to the benefit to the Indians in anywise of the removal of such non-Indian claimants by purchase of their lands and improvements and the transfer of the same to the Indians, and the Secretary of the Interior shall report to Congress the facts with his recommendations in the premises.

9. That all lands, the title to which is determined in said suit or suits, shall, where necessary, be surveyed and mapped under the direction of the Secretary of the Interior, at the expense of the United States, but such survey shall be subject to the approval of the judge of the United States District Court for the District of New Mexico, and if approved by said judge shall be filed in

said court and become a part of the decree or decrees entered in said district court.

10. That necessary costs in all original proceedings under this Act, to be determined by the court, shall be taxed against the United States and any party aggrieved by any final judgment or decree shall have the right to a review thereof by appeal or writ of error or other process, as in other cases, but upon such appeal being taken each party shall pay his own costs.

11. That in the sense in which used in this Act the word 'purchase' shall be taken to mean the acquisition of community lands by the Indians other than by grant or donation from a sovereign.

12. That any person claiming any interest in the premises involved but not impleaded in any such action may be made a party defendant thereto or may intervene in such action, setting up his claim in usual form.

13. That as to all lands within the exterior boundaries of any lands granted or confirmed to the Pueblo Indians of New Mexico, by any authority of the United States of America or any prior sovereignty, or acquired by said Indians as a community by purchase or otherwise and which have not been claimed for said Indians by court proceedings then pending or the findings and report of the board as herein provided, the Secretary of the Interior at any time after two years after the filing of said reports of the board shall file field notes and plat for each pueblo in the office of the surveyor general of New Mexico at Santa Fe, New Mexico, showing the lands to which the Indian title has been extinguished as in said report set out, but excluding therefrom lands claimed by or for the Indians in court proceedings then pending, and copies of said plat and field notes certified by the surveyor general of New Mexico as true and correct copies shall be accepted in any court as competent and conclusive evidence of the extinguishment of all the right, title, and in-

terest of the Indians in and to the lands so described in said plat and field notes and of any claim of the United States in or to the same. And the Secretary of the Interior within thirty days after the Indians' right to bring independent suits under this Act shall have expired, shall cause notice to be published in some newspaper or newspapers of general circulation issued, if any there be, in the county wherein lie such lands claimed by non-Indian claimants, respectively, or wherein some part of such lands are situated, otherwise in some newspaper or newspapers of general circulation published nearest to such lands, once a week for five consecutive weeks, setting forth as nearly as may be the names of such non-Indian claimants of land holdings not claimed by or for the Indians as herein provided, with a description of such several holdings, as shown by a survey of Pueblo Indian lands heretofore made under the direction of the Secretary of the Interior and commonly known as the 'Joy Survey,' or as may be otherwise shown or defined by authority of the Secretary of the Interior, and requiring that any person or persons claiming such described parcel or parcels of land or any part thereof, adversely to the apparent claimant or claimants so named as aforesaid, or their heirs or assigns, shall, on or before the thirtieth day after the last publication of such notice, file his or their adverse claim in the United States Land Office in the land district wherein such parcel or parcels of land are situate, [sic] in the nature of a contest, stating the character and basis of such adverse claim, and notice of such contest shall be served upon the claimant or claimants named in the said notice, in the same manner as in cases of contest of homestead entries. If no such contest is instituted as aforesaid, the Secretary of the Interior shall issue to the claimant or claimants, or their heirs or assigns, a patent or other certificate of title for the parcel or parcels of land so described in said notice; but if a contest be filed it shall proceed and be heard and decided as contests of homestead entries are heard and decided under the rules and regulations of the General

Land Office pertinent thereto. Upon such contest either party may claim the benefit of the provisions of section 4 of this Act to the same extent as if he were a party to a suit to quiet title brought under the provisions of this Act, and the successful party shall receive a patent or certificate of title for the land as to which he is successful in such proceeding. Any patent or certificate of title issued under the provisions of this Act shall have the effect only of a relinquishment by the United States of America and the said Indians.

If after such notice more than one person or group of persons united in interest makes claim in such land office adverse to the claimant or claimants named in the said notice, or to any other person or group of persons who may have filed such contest, each contestant shall be required to set forth the basis and nature of his respective claim, and thereupon the said claims shall be heard and decided as upon an original contest or intervention.

And in all cases any person or persons whose right of a given parcel or parcels of land has become fixed either by the action of the said board or the said court or in such contest may apply to the Commissioner of the General Land Office for a patent or certificate of title and receive the same without cost or charge.

14. That if any non-Indian party to any such suit shall assert against the Indian title a claim based upon a Spanish or Mexican grant, and if the court should finally find that such claim by the non-Indian is superior to that of the Indian claim, no final decree or judgment of ouster of the said Indians shall be entered or writ of possession or assistance shall be allowed against said Indians, or any of them, or against the United States of America acting in their behalf. In such case the court shall ascertain the area and value of the land thus held by any non-Indian claimant under such superior title, excluding therefrom the area and value of lots or parcels of land the title to

which has been found to be in other persons under the provisions of this Act: Provided, however, That any findings by the court under the provisions of this section may be reviewed on appeal or writ of error at the instance of any party aggrieved thereby, in the same manner, to the same extent, and with like effect as if such findings were a final judgment or decree. When such findings adverse to the Indian claim has become final, the Secretary of the Interior shall report to Congress the facts, including the area and value of the land so adjudged against the Indian claim, with his recommendations in the premises.

15. That when any claimant, other than the United States for said Indians not covered by the report provided for in section 7 of this Act, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, purchase, or donation under the provisions of this Act, but has held and occupied any such parcel in good faith, claiming the same as his own, and the same has been improved, the value of the improvements upon the said parcel of land shall be found by the court and reported by the Secretary of the Interior to Congress, with his recommendations in the premises.

16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper office, or officer, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated

as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

17. No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

18. That the pleading, practice, procedure, and rules of evidence shall be the same in all causes arising under this Act as in other civil causes in the Federal courts, except as otherwise herein provided.

19. That all sum of money which may hereafter be appropriated by the Congress of the United States for the purpose of paying in whole or in part any liability found or decreed under this Act from the United States to any Pueblo or to any of the Indians of any pueblo, shall be paid over the Bureau of Indian Affairs, which Bureau, under the direction of the Secretary of the Interior, shall use such moneys at such times and in such amounts as may seem wise and proper for the purpose of the purchase of lands and water rights to replace those which have been lost to said pueblo or to said Indians, or for purchase or construction of reservoirs, irrigation works, or the making of other permanent improvements upon, or for the benefit of lands held by said pueblo or said Indians.

APPENDIX D

Act of June 30, 1834, c. 161, Section 12, 4 Stat. 730,
25 U.S.C. § 177

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of \$1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the appropriation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such States, which shall be extinguished by treaty.

APPENDIX E

Excerpts from Hearings Before a Subcommittee of the Committee on Public Lands and Surveys, United States Senate, 67 Congress, 4th Session on S. 3865 and S. 4223, Bills Relative to the Pueblo Indian Lands (1923): ("Senate Hearings")

Senate Hearings Page 51 (Excerpt from December 29, 1921, letter from colonel R. E. Twitchell, New Mexico historian, attorney and Special Assistant to the Attorney General, to Secretary of the Interior Albert Fall) "The Indians desire that these matters be finally determined upon lines of equity and justice. Advised by their attorneys, employed at various time and for differing purposes, and by attorneys appointed by the Government of the United States, prior to the decision in the Sandoval case, that the Pueblo, acting through its executive officers and its council, had the authority to alienate its communal lands, such officers have made deeds of transfer in good faith and have received fair compensation therefor."

Senate Hearings Page 54—Colonel [R.E.] Twitchell: "During the first decade of our sovereignty, questions as to the rights of these Indians were before the local territorial courts presided over by judges appointed by the President of the United States and having jurisdiction in cases in which the United States was interested; and as I say, these questions as to property rights and other rights, in a number of cases were discussed, determined, and adjudicated and from that time down to the determination of a case reported in 94 U.S., the use of *United States v. Joseph*, the bar of New Mexico and the courts all recognized and considered a transfer or alienation of land by the Pueblo communities, acting as a community and represented by their council and governing authorities as a good and valid transfer. And this interpretation of the law, given out by attorneys in New Mexico and in other portions of the United States to people seeking homes in that country, was accepted as being the law, and

this condition continued down to the time of the admission of New Mexico into the sisterhood of States."

Senate Hearings Page 109—Commissioner Charles H. Burke, Commissioner of Indian Affairs: "Mr. Chairman, since our meeting of yesterday we have considered the suggestion of Senator Jones regarding the adjusting of uncontested claims, by means of filing disclaimers and entering consent degrees and wish to advise the committee that the department favors an amendment to the bill under consideration, along the lines of the Senator's suggestion. We do not desire to cause unnecessary litigation or to cause avoidable court and attorney costs. It is our hope and desire that this entire matter may be settled with absolute justice to the Pueblo Indians and at the same time conserve the equities of those who have in good faith acquired rights to any of the lands in controversy.

It the suggestion of Senator Jones meets with the approval of the committee, the Indian Office will be glad to submit for the consideration of the committee a draft of the proposed amendment.

I am authorized to say that this meets with the approval of Colonel Twitchell."

Senate Hearings page 50—Colonel [R.E.] Twitchell: "Many claims to land within the areas admitted to be Pueblo lands rest upon ancient transfers from individual Indians. These claims, unless supported by proof of governmental approval, Spanish, Mexican, or American, respectfully, must fail, for the reason that the Indian interest is communal and not a separate interest, subject to conveyance by any individual or group of Indians, and therefore any deed from an individual Indian or group of Indians is absolutely null and void, unless such deed shows governmental participation and approval."

Senate Hearings Page 72—Senator Irving C. Lenroot (Chairman of the Senate Subcommittee): "Has the department ever exercised or attempted to exercise any control over the alienation of property by these Indians?"

Colonel [R.E.] Twitchell: "Since the Enabling Act, yes; and since the *Sandoval* case in particular. The leases that have been made by these Indians, which have been made since that time, as I understand it, required the consent of the Superintendent."

Senator Lenroot: "Then I do not understand the distinction between the handling of these Indians by the Department and other Indians."

Colonel Twitchell: "As I say, Indians generally have not enjoyed the position in business life that the Pueblo Indians have."

Senator Lenroot: "No; . . . I am speaking now of the action of the Department. You did say, if I understand you, that the Department was not exercising the same kind of control over these Indians as it did over Indians generally."

Colonel Twitchell: "They are not exercising the same jurisdiction over these Indians that they do over Indians generally."

Senator Lenroot: "That is what I wanted to find out, whether they were or not."

Senate Hearings Page 77—(Excerpt from "an Appeal by the Pueblo Indians of New Mexico to the People of the United States): "The bill will take away our self-respect and make us dependent on the Government and force us into court to fight over and settle things which we have always settled among ourselves without any cost to the Government." [the bill referred to is the Bursum Bill, S.3855].

Senate Hearings Page 154—Senator Holm O. Bursum ((New Mexico senator and sponsor of the original Pueblo lands Bill): "Of course the Secretary of the Interior would stand between the Indian and any injustice."

Mr. Francis Wilson [attorney and representative of Pueblo interests]: "Theoretically."

Senator Bursum of New Mexico: "You would have to trust the Interior Department?"

Mr. Wilson: "Theoretically."

Senator Lenroot: "As a matter of fact this would be a violation of the Government's contract with the Indians, would it not?"

Mr. Wilson: "Yes."

Senator Bursum: "But it is agreed that that shall go out."

Senator Lenroot: "It might be desirable in some cases to have it in. Supposing this were done, but contingent upon the consent of the pueblo involved, would it be beneficial or otherwise?"

Mr. Wilson: "That would be a very difficult question to answer, Mr. Chairman, but that might overcome the serious objection to it."

Senator Lenroot: "Might there be cases where it would be to the interest of the Indians to sell?"

Mr. Wilson: "I cannot think of one. There might be but I have not any in mind."

Senator Andrieus A. Jones (New Mexico senator and member of the subcommittee): "Mr. Wilson, right in that connection, if you take the case where I referred to a while ago, where there are allotments, strips here and there, where the title has been divested from the Indian, might it not be advisable as to the strips where non-Indians have not the title, interspersed with strips where the non-Indians have the title, that there be some disposition of that land so as to get the Indian holdings contiguous to one another?"

Mr. Wilson: "It would be very desirable."

Senator Lenroot: "Under existing law, cannot the Pueblos sell with the consent of the Government?"

Mr. Wilson: "That is our opinion."

Senator Lenroot: "Mr. Commissioner, is there any doubt about that?"

Commissioner Burke: "Perhaps under the *Sandoval* case that might be true, but I do not know whether there have been any sales where the department has had anything to do with it. I rather think not."

Senator Lenroot: "That is true generally of the Indian law."

Commissioner Burke: "I do not think there has ever been a sale of land of the Pueblos under such conditions."

Mr. A.B. Renehan (New Mexico attorney representing settlers): "Congress has taken full jurisdiction of the sale of this land."

Senator Jones of New Mexico: "Would not we have to legislate upon it?"

Mr. Renehan: "Absolutely."

Mr. Wilson: "There is no doubt that the Enabling Act gives authority to Congress."

Senator Jones of New Mexico: "To legislate on the subject."

Mr. Wilson: "Yes."

Colonel Twitchell: That matter has been raised in the United States court where the Indians have been trying to make a lease, and that has been decided as having no Government authority."

Senator Lenroot: "Have we not general legislation that provides for the alienation of Indian lands with the consent of the Secretary of the Interior?"

Commissioner Burke: "Certainly, as to all Indians, except the Pueblos."

Senator Lenroot: "They are not included in the statute?"

Commissioner Burke: "No, and no tribal lands can be alienated except by Act of Congress. This land is not allotted."

Senator Jones: "Is it not true that that authority arose from special legislation with regard to the respective tribes of the Indians that were being dealt with under the special law? There is no general law on the subject that I know of."

Commissioner Burke: "I think there is a general law."

Mr. Renahan: "Not affecting the Pueblos."

Mr. Wilson: There is a general law, but take the Five Civilized Tribes, there is special legislation about them."

Senator Jones of New Mexico: "That is my recollection."

Mr. Wilson: "There is special legislation covering their case, and in the *Sandoval* case the court, in speaking of the tenure to lands of the Pueblo tenants, compared them directly with the tenure of the Five Civilized Tribes. That is patented land, but there was a parallel drawn in the mind of the court, which intended to convey the idea that the Pueblo lands could be handled in precisely the same way as the land of the Five Civilized Tribes."

Senator Lenroot: "I should like to have you consider whether it might not [be] advisable to provide that these lands may be sold or alienated with the consent of both the Pueblo and the Secretary of the Interior."

Mr. Wilson: "That is probably going to be quite desirable under some conditions. In fact we have at different times rather encouraged the idea that if they could make swaps and transfers they could get their lands into much better condition. In fact that was the policy at one time that we had with reference to it."

Senator Lenroot: "Mr. Commissioner, would there be any objection to that on the part of the Government?"

Commissioner Burke: "I do not think so. I think there should be authority so that where it was in the interest of the Indians, they might convey, but I would have it under strict supervision of the Department."

Senator Lenroot: "Oh, certainly."

Mr. Wilson: "And with his consent."

Commissioner Burke: "With his consent, and if necessary, with the consent of the pueblo in which he resided."

Mr. Wilson: "It should be with the consent of the community."

Senator Lenroot: "I think with the consent of the community."

Senate Hearings Page 102—Senator Jones of New Mexico: "Now, I do not believe that there has been such an agitation here as makes it impossible for us to do the right thing. I do not believe that it is so, and I do not believe anybody ought to insist that there should be litigation regarding claims which everybody believes to be just; and I think that at least 75 or 85 percent or perhaps 90 percent, of these adverse claims can be recognized without litigation, and everybody would agree that it should be done; and I do not think that there has been any such sentiment grown up that even the Department of the Interior should not be entrusted with an examination of these claims and recognizing those which are just, and in some way quiet their titles without any expense to those people."

Senator Bursum: "But, Senator, would it not be practical to authorize the Commissioner of Indian Affairs to consent to a decree through his attorney, and in that way take care of that kind of cases."

Senator Jones: "So far as I am personally concerned, I think that would be all right; and it may be advisable for us to suggest the appointment of an independent commission to make an investigation of these claims and advise what claims should be rejected and what claims should not be rejected. But it does seem to me that our procedure should not go to the extent of involving these thousands of people in litigation, whose equities and just claims ought to be recognized, and are as a matter of fact recognized by everyone."

Senator Lenroot: "If it is necessary to have a decree, how are we going to get a record for these claims unless they are based on actual good title?"

Senator Jones: "That is a matter of detail, to use a word which has been rather loosely used here, somewhat. But there is no reason why, upon an examination, there should not be a decree entered without putting parties to the expense of litigation, through attorneys or otherwise."

Senator Lenroot: "It would be rather a novel thing to have a court enter a decree without having before him the merits of the question."

Mr. Renahan: "Suppose that suit was brought and the court should say, 'As to this man we will consent to a decree, and as to that man we will consent to a decree.'"

Senator Lenroot: "That would be the ordinary course. But here is a psychological situation that should be taken into consideration."

Senator Jones: "There are 10,000 or 12,000 people, non-Indians, residing on those pueblo lands. Why bring a suit against people where you do not expect to obtain a decree? And if you want to quiet their titles or give them something new, that could be done by bringing two kinds of suits, one where the complaint recommends a decree in favor of the defendants, and the other where you want to contest the claim of the defendants. Why bring an adverse proceeding against somebody when you do not expect to prosecute it?"

Senator Bursum: "But unless there is a decree, those titles will always be in doubt, subject to some new administration coming in, or some new attorneys coming in and bringing a suit."

Senator Jones: "If you want to sue to quiet title in the settlers, you can do that by consent decree in the first instance."

Senator Bursum: "Oh. yes."

Senator Jones: "And where that sort of proceeding was recommended. But if you are only dealing with those claims that are actually contested, the other people have just as good title as they have now and will have, without any suit at all."

Senate Hearings Page 103—Senator Jones: "But what I want to protest against is providing in this bill for any machinery or procedure to file suits against people when you do not expect to recover judgments against them."

Mr. Wilson: "Mr. Chairman, if I may be permitted to suggest, the argument or the statement with reference

to the substitute bill is going to amply cover the points that the Chairman and Senator Jones are now discussing. It is really anticipating the discussion on that bill, because in that bill we have undertaken to meet, and I believe we have met, the exact situation under discussion."

Senator Jones: "I am saying this at this time in order to get the views of Colonel Twitchell, who is quite familiar with this and who is the legal representative of the department in this matter, and I should like to suggest that he consider some means whereby there shall not be any allowing of adverse litigation against people where the Government does not expect to recover the land."

Colonel Twitchell: "Senator, the only argument that will be raised by those other than the attorneys for the Government, in that proceeding, will be this: As the situation now exists, the mortgage value or real value of all of the lands within the pueblo grants, as held adverse, is absolutely destroyed. Such a cloud exists and such an opinion exists, that the situation is changed; and something must be done. I can not bring myself to the belief that a preliminary report, under the conditions as they exist down there with reference to one case, and entering the various classes everywhere—that any preliminary report will ever be accepted by anybody, but that they will insist on going to court, anyhow."

Senator Jones: "Could we not provide in this bill that as to such claims the Secretary of the Interior would say there should be no litigation, and that as to the others, there should be filed in the court a disclaimer on the part of the United States, or some such decree as that?"

Mr. Twitchell: "Yes sir; that could be done; but I would like to have the direct authorization extended to the governmental agency before I would want to go into court. I live down there the same as you do, Senator Jones, and I do not want to assume governmental responsibilities. I would like to have that done by the duly elected representatives, and not put it on the attorney."

Senator Jones: "If there should be any hesitation on the subject on the part of the Department of the Interior, or the Bureau of Indian Affairs, why not have a commission appointed by the President to make an investigation of these things and to recommend cases which should be prosecuted, and that consent decrees be entered as to the other cases which should not be prosecuted."

Commissioner Burke: "I think the Interior Department is quite willing to assume that responsibility without a commission."

Senator Jones: "I firmly believe that we ought to devise some means of disposing of these claims in two ways, by going ahead and litigating the claims which ought to be litigated, and by a sort of a voluntary confession as to the claims which we believe should not be litigated."

Commissioner Burke: "But, Senator, ought there not to be finally some determination that would forever settle the title?"

Senator Jones: "As to the nonlitigated claims, just for the moment it seems to me that we could provide here that there should be filed in the court a disclaimer on the part of the United States, and that that should settle the question so far as the Indian title is concerned. Somebody, of course, has got to make examination of the facts."

Senate Hearings Page 242—Senator Lenroot: "The bill you introduced provides for a decree in a single case."

Mr. Wilson: "That is correct, so that there will be a *res adjudicata* there."

Senator Lenroot: "I understand; but my only suggestion is that the same thing can be reached through the Federal court as you propose through the State court."

Mr. Wilson: "Yes; but Mr. Chairman, I want to say that—I'm afraid this is going to take me some time. I was going to say, here is today the necessary investigation. If you want prompt action, there will have to be three, there will have to be four, perhaps—special masters that can be assigned to different pueblos. That might be

done. That had not occurred to me. Then, however, there would have to be uniformly between them. That might be accomplished.

I have had it in mind that there should be a *pro forma* adjudication of uncontested titles, as just as long as there is not there is going to be this same turmoil arising constantly; and if it can be brought about so that it is finally adjusted it will be most desirable. If I had one of those titles today I would want to be included in a suit, by disclaimer or consent to an agreed claim, even though I knew my title was absolutely good. I would want a decree as to that."

APPENDIX F

Excerpts on H.R. 13452 and H.R. 13674 before the House of Representatives Committee on Indian Affairs, 67th Cong. 4th Sess. (1923)

"To settle the complicated questions of title and to secure for the Indians all of the lands to which they are equitably entitled is the purpose of this bill." House of Representatives Committee on Indian Affairs, H.R. Rep. No. 1730, 67th Cong. 4th Sess. 6 (1923).

"This bill is to correct the titles to the Pueblo Indians. There has been a great deal of discussion for several months with regard to this matter. This bill is the outcome of intensive hearings held in the Senate and in the House and it is a compromise. It embodies features that will assist tremendously at this time in straightening out the affairs of the Pueblo Indians." 64 Cong. Rec. 5544, 67th Cong. 4th Sess. (March 3, 1923) (Statement of Representative Snyder, Chairman of the Committee on Indian Affairs)

"It is believed that this bill is a fair solution of the many complicated problems involved and that under it the rights of the Indians are fully protected, as well as the equitable rights of non-Indian claimants," S. Rep. No. 1175, 67th Cong., 4th Sess. 5 (1923).

House Hearings Page 40—Mr. [Francis] Wilson: "The Sandoval case, yes; it was important because it was then determined that the Indians were wards of the Government in that decision."

The Chairman Congress Homer P. Snyder (Chairman, House Committee on Indian Affairs): "They did not take any question of title."

Mr. Wilson: "No."

Mr. Roach (a member of the Committee): "That makes it a judicial determination. I had not read this but it may have been like a lit of similar cases, where the judge in writing an option [sic] runs far afield among subjects which is not deciding."

Mr. Gensman (a member of the Committee): "And didn't know what he was talking about."

Mr. Wilson: "The point about this is this, that always prior to that time these Indians had been considered free agents who could buy and sell the same as anybody else. That case decided that they were not free agents but were wards, and that condition had existed since 1848 as far as this Government was concerned."

APPENDIX G

The following letter is included in the John Collier Papers,
Sterling Library, Yale University, New Haven, Connecticut.

COPY

AMERICAN INDIAN DEFENSE ASSOCIATION
1037 Mills Bldg.
San Francisco, California

July 20th, 1928

Mr. W. B. Storey,
Pres., A..T. & S.F. Ry.,
915 State St.
Santa Barbara, California

Dear Mr. Storey:

Your letter of July 17th written at Santa Barbara has just reached me, the delay being caused by my absence on a long trip into the Indian country.

In view of your attitude, not only fair by [sic] generous, on the Middle Rio Grande Conservancy matter as affecting the Indians, the hearing of the statement on page 18 of our bulletin No. 12 is to be regretted. Neither the text for the heading of that article were submitted to Mr. Marshall, who was in Europe—the publication is from our western office.

We would be glad to have you indicate what sort of correction might be published in the next issue of the American Indian Life.

I should explain that the effect of casting, as you say, an aspersion against the Santa Fe Railway, was not in my own mind when I wrote the head line in question. The body of the text appears to be rigidly accurate and to contain no injustice even by inadvertence.

* * * *

I hope that the facts as seen from the angle of the Indian Defense Association are made clear in this letter. In very many ways the interests of the Pueblo Indians and of the Santa Fe Railway are identical; the logical position of the Santa Fe Railway is to conserve the life of the Pueblo Indians, and the Santa Fe Railway is acting consistently on that line. Ultimately the chief outside force in making possible a future for these Pueblos will be the Santa Fe Railway, as we are increasingly convinced. Already, the Indian detour is being worked out in such a fashion as to help the Indians, whereas if done in other than a far-sighted and skillful manner it would hurt them. This fact has especially impressed me during my visit to the Pueblos this year and after a long conference with Mr. Clarkson at Santa Fe.

The present crisis is one which undoubtedly does jeopardize the whole future of the Pueblos north and south of Albuquerque. The injustice of the tentative agreement is gross, indeed it is incredible. There is no doubt that a medium of active intervention by the Santa Fe Railway would tilt the balance and insure a re-drafting of the tentative agreement on lines fair to the Indians and ultimately much more beneficial to the whole Rio Grande Valley than is the present text of the agreement.

Cordially,

(signed) John Collier

P.S. I have not had a chance to confer with Mr. Marshall since his return from Europe, and this letter is written without consulting him. I am taking the liberty of forwarding to him a copy of your letter and of this letter.

J.C.

APPENDIX H

Act of February 27, 1925, 43 Stat. 1008:

Section 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the lien of any debt, claim, or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior.

Act of July 2, 1945, 59 Stat. 313:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That no conveyance made by an Indian of the Five Civilized Tribes on or after April 26, 1931, and prior to the date of enactment of this Act, or lands purchased, prior to April 26, 1931, for the use and benefit of such Indian with funds derived from the sale of, or as income from, restricted allotted lands and conveyed to him by deed containing restrictions on alienation without the consent and approval of the Secretary of the Interior prior to April 26, 1931, shall be invalid because such conveyance was made without the consent and approval of the Secretary of the Interior: Provided, That all such conveyances made after the date of the enactment of this Act must have the consent and approval of the Secretary of the Interior: Provided further, That if any such conveyances are subject to attack upon grounds other than the insufficiency of approval or lack of approval such conveyances shall not be affected by this section.

Act of May 27, 1908, 35 Stat. 312:

Section 9. Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two

(Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

Section 6 . . .

Any suit brought by the authority of the Secretary of the Interior against the vendee or mortgagee of a town lot, against whom the Secretary of the Interior may find upon investigation no fraud has been established, may be dismissed and the title quieted upon payment of the full balance due on the original appraisalment of such lot: Provided, that such investigation must be concluded within six months after the passage of this act.

Nothing in this act shall be construed as a denial of the right of the United States to take such steps as may be necessary, including the bringing of any suit and the prosecution and appeal thereof, to acquire or retain possession of restricted Indian lands, or to remove cloud therefrom, or clear title to the same, in cases where deeds, leases, or contracts of any other kind or character whatsoever have been or shall be made contrary to law with respect to such lands prior to the removal therefrom of restrictions upon the alienation thereof; such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, the necessary expenses incurred in so doing to be defrayed from the money appropriated by this act.

APPENDIX I

The following passages are excerpted from the transcript of the Proceedings of the Pueblo Indian Council held at Pueblo of Santo Domingo, New Mexico, on January 17, 1924. John Collier Papers, Sterling Library, Yale University, New Haven Connecticut:

PROCEEDINGS OF
PUEBLO INDIAN COUNCIL
HELD AT
PUEBLO OF SANTO DOMINGO
NEW MEXICO
JANUARY 17, 1924

At a meeting of the representatives of the different Indian Pueblos of the State of New Mexico, held in the Pueblo of Santo Domingo in Sandoval County, New Mexico, on the 17th day of January, 1924, at which meeting the following Pueblos were represented, to wit:

Pueblo of San Juan
Pueblo of Santa Clara
Pueblo of San Ildefonso
Pueblo of Nambe
Pueblo of Pojaoque
Pueblo of Tesuque
Pueblo of Cochiti
Pueblo of Santo Domingo
Pueblo of San Felipe
Pueblo of Jemez
Pueblo of Santa Ana
Pueblo of Sandia
Pueblo of Isleta

there also being present:

Mr. John Collier, of New York,
Mr. & Mrs. Gerald Cassidy, of Santa Fe, N.M.

Mrs. Adelina Otero-Warren, representing the Government Indian Service,
M.C. Safford, Stenographer,

the following proceedings were had, to wit:

* * * *

MR. COLLIER: My friends, I am happy to be with you once more. When I came to Santo Domingo Pueblo three days ago I learned that the Governor of Santo Domingo had called a meeting of all the pueblos. I believe this meeting was called just a little while ago and that news about the meeting did not reach some of the pueblos for I find that Zuni isn't here, and I believe the Pueblos south of Albuquerque are not here,—west of Albuquerque, but all the pueblos which are especially interested in the land question are here, so I think we can proceed as if all the pueblos were here.

So far as I know, all of the pueblos except Laguna stand firm, faithful to the declaration which was made at the meeting in August of all the pueblos here. This (indicating pamphlet) is the declaration. Most of you have received copies of it and I will read parts of it to you again after a while.

Now why are we here today? Why have I come to meet you today? It is because there is again a great danger at Washington. Congress is meeting once more and Senator Bursum has introduced a bill. This (indicating) is Senator Bursum's bill, and it is exactly the same as the Lenroot bill which the Council of all the pueblos condemned at its meeting in August,—opposed. After a while I will tell you more about the Bursum bill.

The friends of the Pueblos have prepared a different,—another bill. This (indicating) is the bill which is endorsed,—favored—endorsed by the Federation of Women and the American Indian Defense Association, and this bill is exactly like the declaration which all of the Pueblos

adopted in August at Santo Domingo. I will tell you more about this bill after a while.

So this is the condition,—the situation. There is one bill before Congress which would confiscate, destroy, the Pueblo titles to the land which the white people have taken away from the Pueblos. There is another bill before Congress which would restore to the Pueblos,—give back to the Pueblos,—much of the land to which the Pueblos hold title, but which the White people have taken. If the Bursum bill should pass and become law it will be a very heavy blow against the Pueblos and a very heavy blow to the honor of the United States, so the Pueblos today are facing,—are standing in front of,—are facing the same danger and the same condition that they faced a year ago when they met in this Pueblo, in this room, and made their appeal to the American people to defend the rights of the Pueblos, and when they agreed to send a delegation to Washington.

Now you know that thousands of white men occupy the Pueblo land and many of these white men got the land either by purchase, by buying it from an individual Indian, which was always illegal—against the law—or by simply taking it without paying anybody, and you also know that many white men started by getting a little Indian land and then they claimed more and more so that after a while the white man who had started with one acre, an acre which he did not own, which he held illegally, in twenty-five years he or his family, or somebody he sold the land to, would claim ten acres. All this is an old story to you.

Now about the Bursum bill. The Bursum bill says, in Section 4, that any white man who occupies Indian land and who has occupied it for twenty years, if he has some kind of paper to show, he can keep that land always. The Bursum bill required the court, makes it necessary for the courts, to give title to that white man. Or, if a white

man has been on Pueblo land thirty years, even if he has no paper to show for it he can stay there always. The courts are required to give the title to the white man. You see the meaning of that? Suppose a white man, when you men were boys, thirty five years ago, went to an Indian, an individual Indian, and said "here is ten dollars; now you sell me that piece of Indian land". and the Indian took the ten dollars and the white man took the land. All that was absolutely illegal. That was a fraud. But the Bursum bill would give that land to that white man, or to the people he had sold it to. Or if he simply grabbed the land,—took it and stayed on it, he could have it.

Now you men all understand that the Pueblo Indians are wards of the Government. The United States Government is trustee and guardian for the Pueblo Indians, just the way it is for other Indians. If a white man takes land from another white man and the other white man doesn't do anything about it,—don't care anything about it,—and the white man stays on that land for twenty or thirty years, then by the laws of the most of the different states the white man who took the land can keep it, no matter whether he paid for it or not. This is called the "statute of limitations." But if anybody takes a piece of land that belongs to the Government without having authority to take it, and kept it twenty or thirty years, or fifty or a hundred years, that does not give him the ownership. The statute of limitations does not apply against the United States Government. In the same way the statute of limitations does not apply against a ward and the Indians are wards of the United States Government. How do I know this? I know this because the Supreme Court says so. The Supreme Court in 1913 laid down the law about the Pueblo Indians and it said the Indians are wards of the Government in the same way all other Indians are, and they always have been. I do not stop to read the Supreme Court decision to you because

nearly all of you have already had this pamphlet (indicating) which gives that decision,—prints it.

* * * *

Now I want to tell you something else about this Bursum bill. The Bursum bill wipes out the Indian land titles without the consent of the Indians and without compensating them at all. A great fight is being waged against the Bursum bill. The country has been roused up,—all the United States has been roused up about the Bursum bill. There never was any Indian question about which the people were so roused up as they are about this question. Now if the Bursum bill which confiscates the Indian titles, which denies them the equal protection of the laws, if this bill can be made law in spite of all of the people who are fighting it, then all the people who want to take all of the Indian land will be very much encouraged and the friends of the Indians will be very much discouraged and sad and the Bursum bill will be followed by other bills taking more land away from the Indians until after a while the white people will have all of the Indian land, just like it is in California now, when the white people went on step by step with the consent of Congress and the Government and took more of the Indian land and more until at least the Indians didn't have any land at all and were homeless. It was the same way in Nevada and almost that way in Oregon and Washington. It is not just this one bill, it is this bill and the other bills coming after it in the next Congress and the Congress after the next, taking away slowly more and more of the Indian land. Our fight against the Bursum bill is not only a fight to defeat the Bursum bill, it is a fight to establish that Congress has no right to confiscate Indian land. It is a fight to establish that Indians shall have the same right before the law,—the same protection before the law, as white men. If we lost this fight against the Bursum bill not only do the Pueblos lose their right to recover their lost land, but all the Indians in the country suffer a very terrible blow.

Now I have no more to say about the Bursum bill, unless there is some one who wants to ask me questions.

* * *

Now I will explain the other bill. This bill (indicating) has now been introduced into Congress. The latest information I have, the last news I had, was that Senator Curtis was going to introduce this bill. Senator Curtis is a very strong man and a good friend of the Indians, but he also is a very busy man and I sent word to our lawyers in New York that we wanted Senator Curtis to introduce the bill if he would say that he could give time to it and would work for it, but if he was too busy and couldn't promise us that he would work hard for the bill and fight for it, then I said "get another Senator to introduce the bill." I said "get Senator Johnson of California or Senator LaFollette or Senator Pepper of Pennsylvania, or some other strong man", so I cannot tell you for sure which Senator is introducing this bill, but this bill and the Bursum bill will both come up before the Senate Committee next week and during the hearings that will go on perhaps for a long time.

Now I will tell you about this bill. We call this bill "The Indian Bill." It is exactly the same as this Pueblo declaration and its fundamental idea is this; that Congress does not take away from the Indians any title which they have to any land. Any title which the Indians legally hold and which they could enforce in the courts is left with the Indians. Then this bill creates a Commission of three men, one of these men appointed by the President and one by the Attorney General and one by the Secretary of the Interior, and this Commission comes to New Mexico and it goes to one Pueblo after another. It goes to Tesuque and then after that it goes to San Ildefonso and to all the Pueblos and it holds meetings with the Indians and it asks the Indians this question: "which lands now occupied by the white men of all these lands the white men hold that belong to you,

which lands do you really need?" "Which lands do you really need for your farming work, and which lands do you need so that you can have your life in your Pueblo together?" And the Indians say "we need this land and this land and this land." And the Commission says to the Pueblos, "which lands are you willing to give up if the Government compensates you,—pays you?"

Now the Pueblos already have said that they are willing to give up their title to the old towns if they can be given the value of that land in return, and other things they are willing to give up, such as cemeteries, churches and missions and rights-of-way of the railroads, if those rights-of-way have been paid for,—if the Indians have had payment for them. That means proper payment,—the payment they ought to have. They have said "we will give up these old towns and cemeteries and missions if the United States will give us in return the value of the land as farm land,—the farm value,—the unimproved value. Now the Pueblo would say, one Pueblo, "we want that compensation in money." Another one would say "we want it in other land." Others would say "we want forest land, grazing land." That would be for the Pueblo to decide, each Pueblo to decide.

* * *

Now that is our bill. You see it is very simple. It does not take away from any man, Indian or white, any land to which he holds legal title. It does not take cases out of the courts that are being litigated by due process of law and settle them in a lawless way by an Act of Congress. Nobody questions that it is constitutional. The courts will not throw it out. It protects the Indians completely. It guarantees that much of their land will be given back to them. At the same time it protects the white settlers because it guarantees them compensation when they have to be moved off of the Pueblo land, and it makes it possible for the people living in the old towns to get a clear title to their homes and their stores and all

that. This bill is so simple and so fair to both sides, it protects the Indians so completely and yet it is so generous to the white people, that we believe if we work hard enough we can get Congress to pass this bill now and if this bill is passed it not only will be a great victory for the Indians, it not only will restore to them much of their land, but it will guarantee the future—it will protect the future—it will make it impossible for white men in the future to seize the Pueblo lands.

* * *

(Thereupon, upon vote taken and carried the following were named to serve upon said committee:

Vistoriano Sisneros (Santa Clara)
 Juan Jose Trujillo (Cochiti)
 Tomasito Tenorio (Santo Domingo)
 Donaciano Sanchez (San Felipe)
 Desiderio Naranjo (Santa Clara)

(At this time a recess was taken until 2:30 p.m.)

SOTARO ORTIZ: (Chairman) Here is the report of the Committee. It must be read now.

"Pueblo of Santo Domingo,
 New Mexico
 January 17, 1924.

We, the authorized delegates to the Council of all the pueblos hereby, after renewing considerations, state our opposition to the Bursum bill and to the kind of resolution of the Pueblo land questions which that bill represents. And we state again our endorsement of the Indian plan which conforms to the principals and the details laid down in the declaration of the Council of all the Pueblos adopted August 25, 1923. And on behalf of our people, who have suffered so long and whose existence is at stake, we once more appeal to the American people. It is now proposed, as last year, to cancel our land title by re-enacted law. It is proposed to snatch

our land cases out of the courts where we are now litigating for our rights and to settle these cases by a law directed against us. It is proposed to deny us the equal protection of the laws. As God made us Indians, we want to be always Indians in this world. God made all kinds of races. He made us Indians and we wish to go on as our ancestors began and to be known always as Indians. We know as Indians that our ceremonies which are being attacked are not for the sake of our Indian people only, but are for the whole world. We want to be faithful to Uncle Sam and faithful to our own race too. Do the American people want to see the Indian race destroyed? Instead of harming the American people, we are proposing to give to them what is ours, our lands that our ancestors have lived on for thousands of years. We are the first owners of the land. We do not want to be destroyed and we are not asking for any more than is ours. We call to the American people to pay attention to our distress and to help us to keep those rights and those lands which were guaranteed us by President Lincoln, as Spain had guaranteed them before. We are making an offer to surrender voluntarily with the consent of the Government, our guardian, our legal title to such lands claimed by the white man, but legally ours, as are not absolutely necessary to our individual and common existence. But this does not satisfy those who are seeking to take away our legal rights and our Pueblo future. We offer to give them much, but they demand all. [we] are voteless, we are far away from the great cities and from Washington. Shall we be ruined through a wicked law and destroyed through an unnecessary injustice? Will our American friends help us once more?"

Now that is the report of the Commission that has been appointed. Now all those that are in favor of this resolution, you can stand up.

(Thereupon a majority of those present arose) Everybody is in favor of it then?

(Many answer "Yes")

(Thereupon, a call of the Pueblos being made, the same resulted as follows:

San Juan: Present
 Santa Clara: Present
 San Ildefonso: Present
 Nambe: Present
 Pojoaque: Present
 Tesuque: Present
 Cochiti: Present
 Santo Domingo: Present
 San Felipe: Present
 Jemez:

* * *

APPENDIX J

Brief on behalf of the Council of all New Mexico Pueblos. The Complete Brief, submitted to Congress and to other participants in the Pueblo lands proceedings, is located at the National Archives of the United States, Records of the Office of Indian Affairs, RG 75, 013-1921, 45918 Pt. 8 - Pt. 8-19.

In the Matter of

THE NEW MEXICO PUEBLO LANDS
 WHITE CLAIMS UPON LAND GRANTED
 TO THE PUEBLOS

* * *

Brief on behalf of:

The Council of all the New Mexico Pueblos.

The Indian Welfare Committee of the Public Welfare Department, General Federation of Women's Clubs.

The American Indian Defense Association, Inc.

The American Indian Defense Association of Santa Barbara.

A. A. BERLE, JR.,
 HOWARD S. GANS,
 HERBERT K. STOCKTON, *Counsel for*

American Indian Defense Association,

The Council of All the New Mexico Pueblos,

The American Indian Defense Association of Santa Barbara.

Published by

THE AMERICAN INDIAN DEFENSE ASSOCIATION, INC.
 33 West 44th Street, New York City
 December 10, 1923

* * *

I.

THE "LENROOT SUBSTITUTE" IS AN ATTEMPT TO FORECLOSE JUST INDIAN CLAIMS TO LANDS TAKEN FROM THEM. IT SHOULD BE OPPOSED BY ALL INDIAN FRIENDS.

It becomes necessary to examine a little further the basis of the titles and claims. The history and the legal principles are somewhat complex. The issue is tremendously simple. It is in substance that to the 75% of disputed land holdings the Indians have a proper and just claim. They are entitled to have this claim decided on its merits in the Courts. They are entitled not to have their case pre-judged against them by a legislative decree.

Valid White Titles

Valid titles against the Indians—the 10% spoken of above—are relatively rare. Substantially, all of them were acquired in one of the following ways:

(a) By a Spanish grant which extinguished the Pueblo Indian title. There are a few of these—but very few. Some squatters have attempted to justify their claims by forging such grants. The genuine old Spanish grants are few and hard to find; but where they existed, the land has ceased to belong to the Indians, and the Indians recognize this fact.

(b) Lands acquired by a deed from the Pueblo *as a community*, and approved by the Spanish, or the Mexican, or the United States Government authorities. There are some of these grants. They are rare. Notice, however, that in such cases the community, and not individual Indians, alone can act.

(c) Lands whose title has been approved by a final decree of some Court. There are only a few instances of such titles.

(d) Possibly, but not certainly, lands deeded by the Pueblo community as such, without Government approval. There is every reason to believe that such grants are invalid. But the Pueblos, very honorably, as a general thing concede that whether the title so acquired is valid or not, if the Pueblo itself approved, it will stand by its act. Even in these cases Pueblos should not be called upon to concede validity, however, because such grants made by the Indian towns without protection were not infrequently fraudulently acquired, and in some instances the payment which was to have been made never was received.

The foregoing make up the estimated 10% of valid claims. In general they cannot and should not be disturbed. Insofar as these claims existed in 1848, when the United States acquired New Mexico by the Treaty of Guadeloupe Hidalgo, that Treaty expressly recognized the validity of such titles. Under the Constitution of the United States no Statute can impair them. The same Treaty recognized the validity of the Indian titles.

* * * *

This commission shall go upon the land, determine the recent seizures—lands held without color of title for less than thirty-five years, or with color of title for less than twenty-five years—and direct immediate suit to recover these lands. It shall then ascertain all other white claims to Indians lands; and the value of these claims; and having done so shall endeavor to work out with the Pueblos an arrangement by which the Pueblo agrees voluntarily to relinquish its claim to such of the lands as the Pueblo does not vitally need for its communal life; the relinquishment to take effect on the day when compensation is paid to the Pueblo. All white settlers on lands so relinquished thereby acquire a perfect title. As to the lands which the Pueblo needs, it is contemplated that the commission shall report Pueblo by Pueblo to Congress, asking appropria-

tion to compensate such of the settlers as may be removed by process of law; and upon the provision for such compensation, that suits shall be brought to recover these lands for the Indians. In this way, as soon as the commission has reported, and Congress has authorized appropriations for compensation, law suits will be started to recover those lands which the Indians urgently need. When the Indians recover this land, the settler thus removed will automatically become entitled to compensation with which he can start life elsewhere.

In any such law-suit, if the settler has not a doubtful or bad title, but a good title, he is to be entitled to assert it; and having shown his title he then may rightfully remain where he is. If he fails to do this the Indians may recover their land, and the settler will recover compensation if he can show long possession and good faith.

It is a just and adequate proposal. It is more generous than any white man similarly situated would be willing to make. It does not call for any prejudging by Congress of any one's title. It leaves Indian and settler alike open to assert such rights he has in the United States Courts.

It does call for payment by the United States where the Indians give up lands or where the settlers are required to remove. We see no impropriety in placing this responsibility squarely on Congress. It is through seventy-five years of neglect that the Pueblo land problem has arisen. It was the business of the United States as guardian of these Indians to prevent the development of exactly this situation; to protect Indians by keeping their lands intact; to protect settlers by not permitting them to occupy Indian's lands indefinitely in the false belief that they had rights which did not exist.

It has been argued that the relinquishment of lands involves the consent of the Pueblos; and that if the Pueblos are to consent to anything, the settlers should likewise do so. The only reason for the Indian's consent

lies in the fact that the Indians are proposing voluntarily to assist as many of the settlers as they safely can by voluntarily giving up their claims. Congress cannot take these claims away from them under the Constitution. The only way other than by Court decree—which may well be in favor of the Indians—to extinguish an Indian claim is by Indian consent with Government approval. If the settlers were willing to offer to relinquish any lands in favor of the Indians their consent also would be asked and desired. They are not doing so. They are claiming everything which they now have whether entitled by law or not. Their rights are safeguarded by giving them an absolute day in Court, after the Commission with the Indian concurrence has determined what lands the Indians need to recover; for after all this is done, to revest themselves of their lost lands the Indians must bring suit in Court, at which time the settlers, if they have any rights, may make them good.

It has been familiar tactics on the part of the settler groups to raise the cry that any attempt of the Indians to recover any land means the wholesale eviction of the settlers within the confines of an Indian grant. Such claims have irresponsibly been made. But an examination of the "Indian Plan" will show that they are unfounded. The one motive in this plan is the equitable solution of the entire problem with as few evictions and as little hardship as possible; and with adequate compensation for any party who must give up honest claims.

Accordingly, it is submitted that the Indian Plan, or Legislation substantially embodying its features, should be passed by Congress as soon as possible.

CONCLUSION

The "Lenroot Substitute" is inadequate, unjust. It should be replaced by legislation embodying the substance of the "Indian Plan."

This is the least than can be done to cure a classic
spectacle of injustice.

Respectfully submitted,

A. A. BERLE, JR.
HOWARD S. GANS
HERBERT K. STOCKTON

* * * *

12
No. 84-262

Office-Supreme Court, U.S.

FILED

JAN 7 1985

ALEXANDER L. STEVAS,
CLERK

In The
Supreme Court of the United States
October Term, 1984

— o —
MOUNTAIN STATES TELEPHONE
AND TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent.

— o —
ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

— o —
BRIEF AMICUS CURIAE OF THE
PUEBLO DE ACOMA IN SUPPORT OF THE
POSITION OF THE RESPONDENT

— o —
PETER C. CHESTNUT
CHESTNUT, READ & SALVADOR
620 Roma N.W.
Suite D
Albuquerque, NM 87102
(505) 842-6060
Attorney for Pueblo de Acoma

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
I. SECTION 17 OF THE PUEBLO LANDS ACT AFFIRMED THAT CONGRESS, TOGETHER WITH THE PUEBLO AND THE SECRE- TARY OF INTERIOR, MUST APPROVE THE CONSENSUAL ALIENATION OF PUEBLO LANDS AFTER JUNE 7, 1924	4
A. Congress Intended the 1924 Pueblo Lands Act to Clear Up Land Title Uncertainty Then Existing Within The Exterior Boundaries of the Lands of the New Mexico Pueblos	5
B. The Language of § 17 Clearly Shows Congres- sional Intent to Bar Future Loss of Pueblo Land Without Subsequent Specific Congres- sional Authorization	11
II. THE ADMINISTRATIVE CONSTRUCTION OF SECTION 17 BEING UNAUTHORIZED BY THAT SECTION, INCONSISTENT THEREWITH AND NOT THE RESULT OF ANY DELEGATED AUTHORITY, IS NOT ENTITLED TO DEFERENCE	13
III. AN EQUITY SUIT FILED AND CONCLUDED UNDER § 3 OF THE 1924 ACT DOES NOT BAR THIS ACTION	21
CONCLUSION	26

TABLE OF AUTHORITIES

	Page
FEDERAL CASES:	
<i>Addison v. Holly Hill Fruit Products, Inc.</i> , 322 U.S. 607, 88 L.Ed. 1488 (1944)	15
<i>Allen v. McCurry</i> , 449 U.S. 90, 66 L.Ed.2d 308 (1980) ..	22
<i>Alonzo v. United States</i> , 249 F.2d 189 (CA10 1957), cert. denied, 355 U.S. 940 (1958)	13
<i>Aluminum Co. v. Cent. Lincoln Peoples Util. Dist.</i> , — U.S. —, 81 L.Ed.2d 301 (1984)	19
<i>American Ship Building Co. v. NLRB</i> , 380 U.S. 300, 13 L.Ed.2d 855 (1965)	17
<i>Baltimore & Ohio Railway v. Jackson</i> , 353 U.S. 325, 1 L.Ed.2d 862 (1957)	21
<i>Batterton v. Francis</i> , 432 U.S. 416, 53 L.Ed.2d 448 (1977)	14
<i>Blum v. Bacon</i> , 457 U.S. 132, 72 L.Ed.2d 728 (1982)	19
<i>Brown v. Felson</i> , 442 U.S. 127, 60 L.Ed.2d 767 (1979) ..	24
<i>Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority</i> , — U.S. —, 78 L.Ed.2d 195 (1983)	15, 17, 18
<i>Chemehuevi Tribe of Indians v. Federal Power Commission</i> , 420 U.S. 395, 43 L.Ed.2d 279 (1975)	5
<i>Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. —, 81 L.Ed.2d 694 (1984)	13
<i>Drummond v. U.S.</i> , 324 U.S. 316, 89 L.Ed. 969 (1945) ..	23
<i>Escondido Mutual Water Company v. La Jolla Indians</i> , — U.S. —, 80 L.Ed.2d 753 (1984)	12
<i>F.M.C. v. Seatrain Lines, Inc.</i> , 411 U.S. 726, 36 L.Ed.2d 620 (1973)	14

TABLE OF AUTHORITIES—Continued

	Page
<i>Federal Election Committee v. Democratic Senatorial Campaign Committee</i> , 454 U.S. 27, 70 L.Ed.2d 23 (1981)	14, 15, 17, 18
<i>Federal Power Commission v. Union Electric Co.</i> , 381 U.S. 90, 14 L.Ed.2d 239 (1965)	5
<i>Federated Department Stores, Inc. v. Moitie</i> , 452 U.S. 394, 69 L.Ed.2d 103 (1981)	24
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125, 50 L.Ed.2d 343 (1976)	19
<i>Girouard v. United States</i> , 328 U.S. 61, 90 L.Ed. 1084 (1946)	21
<i>Guardians Assn. v. Civil Service Commission of the City of New York</i> , — U.S. —, 77 L.Ed.2d 866 (1983)	14, 18
<i>Massachusetts Trustees v. United States</i> , 377 U.S. 235, 12 L.Ed.2d 268 (1964)	5
<i>Montana v. United States</i> , 440 U.S. 147, 59 L.Ed. 2d 210 (1979)	23
<i>Morton v. Ruiz</i> , 415 U.S. 199, 39 L.Ed.2d 270 (1974)	18, 19
<i>NLRB v. Brown</i> , 380 U.S. 278, 13 L.Ed.2d 839 (1965) ..	17
<i>Nevada v. U.S.</i> , — U.S. —, 77 L.Ed.2d 509 (1983)	23, 24, 25
<i>Northern Cheyenne Tribe v. Hollowbreast</i> , 425 U.S. 649, 48 L.Ed.2d 274 (1976)	11
<i>Northeast Marine Terminal Co. v. Caputo</i> , 432 U.S. 249, 53 L.Ed.2d 320 (1977)	14
<i>Piper v. Chris-Craft Industries, Inc.</i> , 430 U.S. 1, 51 L.Ed.2d 124 (1977)	19
<i>Pittston Stevedoring Corp. v. Delaventura</i> , 544 F.2d 35 (CA2 1976)	14, 15

TABLE OF AUTHORITIES—Continued

	Page
<i>Plains Electric Generation and Transmission Co-operative, Inc. v. Pueblo of Laguna</i> , 542 F.2d 1375 (CA10 1976)	20
<i>Pratt and Whitney Aircraft v. Donovan</i> , 715 F.2d 57 (CA 2 1983)	14
<i>Pueblo of Santa Ana v. Mountain States Telephone and Telegraph Co.</i> , 734 F.2d 1402 (CA10 1984)	22
<i>Smith v. Stevens</i> , 77 U.S. (10 Wall.) 321, 19 L.Ed. 933 (1870)	4
<i>Southeastern Community College v. Davis</i> , 442 U.S. 397, 60 L.Ed.2d 980 (1979)	18
<i>Teamsters v. Daniel</i> , 439 U.S. 551, 58 L.Ed.2d 808 (1979)	18
<i>Udall v. Tallman</i> , 380 U.S. 1, 13 L.Ed.2d 616 (1965)	19
<i>United States of America as Guardian of the Pueblo of Acoma v. Arviso</i> , No. 2079 in Equity (D.N.M. 1931)	2, 21, 22, 26
<i>United States of America as Guardian of the Pueblo of Santa Ana v. Brown</i> , No. 1814 Equity, (D.N.M. 1927)	21, 22, 25, 26
<i>United States v. George</i> , 228 U.S. 14, 57 L.Ed. 712 (1913)	14, 18
<i>United States v. Morton</i> , 467 U.S. —, 81 L.Ed.2d 680 (1984)	17
<i>United States v. Pueblo of Taos</i> , 515 F.2d 1404 (Ct. Cl. 1975)	26
<i>United States v. Sandoval</i> , 231 U.S. 28, 58 L.Ed. 107 (1913)	6

TABLE OF AUTHORITIES—Continued

	Page
<i>United States v. Vogel Fertilizer Co.</i> , 455 U.S. 16, 70 L.Ed.2d 792 (1982)	14, 18
<i>United States v. Wooten</i> , 40 F.2d 882 (CA10 1930)	10
<i>Wade v. Lewis</i> , 561 F.Supp. 913 (N.D. Illinois, E.D., 1983)	21
<i>Worcester v. Georgia</i> , 31 U.S.. (6 Pet) 515, 8 L. Ed. 483 (1832)	13
<i>Zenith Radio Corp. v. United States</i> , 437 U.S. 443, 57 L.Ed.2d 337 (1978)	19
<i>Zuber v. Allen</i> , 396 U.S. 168, 24 L.Ed.2d 345 (1969)	17, 20
FEDERAL STATUTES:	
Indian Trade and Intercourse Act of 1834, 4 Stat. 729, 730, § 12, 25 USC 177	4
Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848)	1
Act of December 22, 1858, 11 Stat. 374	1
Indian Right of Way Act of 1899, 30 Stat. 990, 25 USC 312 et seq.	16, 20
Pueblo Lands Act of June 7, 1924, 43 Stat. 636	passim
Act of May 10, 1926, 44 Stat. 498	9, 17, 20
Act of April 21, 1928, 45 Stat. 442, 25 USC 322	3, 9, 17, 20, 21
LEGISLATIVE HISTORY:	
S. Rep. 492, 68th Cong., 1st Sess. (1924)	5, 6, 7, 10
H.R. Rep. 787, 68th Cong., 1st Sess. (1924)	5, 8, 9

TABLE OF AUTHORITIES—Continued

	Page
OTHER AUTHORITIES:	
F. Cohen, <i>Handbook of Federal Indian Law</i> (second edition, 1982), page 516	5
L.C. Kelly, "Section 17 of the Pueblo Lands Act: A Study of Legislative History and Administrative Practice," (1985)	16
<i>Restatement (Second) of Judgments</i> (1982) §§ 26 and 42	25
<i>Restatement (Second) of Trusts</i> § 170	26

INTEREST OF AMICUS CURIAE

The Pueblo de Acoma is a domestic nation which has existed in its present location for over a thousand years. Acoma's land ownership has been recognized by the Spanish, Mexican, and United States sovereigns. Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1848); Act of December 22, 1858, 11 Stat. 374. The Acoma lands confirmed and granted to it by patent issued in 1877 are presently encumbered by rights-of-way and deeds from the Pueblo which rely for their validity on approval by the Secretary of Interior pursuant to Section 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 ("§ 17"). These encumbrances include:

1) December, 28, 1880 deed to the Atlantic & Pacific Railroad Company, approved January 22, 1931, by the First Assistant Secretary of Interior "insofar as it grants rights-of-way in stone or rock for the construction and maintenance of the grantee's main line of railroad and insofar as it grants water which the grantee has already developed and used and is now using for railroad purposes at its station designated as McCartys and is hereby disapproved insofar as it attempts to grant the right to take stone or rock for commercial purposes and insofar as it purports to give grantee the right to develop water anywhere within the Pueblo of Acoma grant, and to construct pipelines to transport the same to the grantee's main line right-of-way." Acoma received \$1.00 for executing this deed.

2) October 2, 1911 deed to the Atchison, Topeka & Santa Fe Railroad Company (ATSF) conveying a tract of land varying from 50 to 400 feet wide "measured from the north side of the right-of-way of said railroad, the total acreage contained in said strips being 97.59 acres, more or less." Acoma received \$8,000 in consideration for the execution of this deed.

3) June 9, 1928 easement or right-of-way conveyance to Mountain States Telephone and Telegraph Company (Mountain Bell), approved by the Assistant Secretary of Interior. Mountain Bell paid \$75.00 for this right-of-way.

The 1880 and 1911 deeds indicate that none of the Acoma leaders were literate. Each party "signing" the document on behalf of the Pueblo did so by "his mark." Only one of the six individuals signing the 1928 document for Acoma could write his name.

Both ATSF and Mountain Bell had been using these Acoma lands long before passage of the Pueblo Lands Act of 1924. The Pueblo Lands Board (the Board) determined that Acoma's title to these lands and five other claims had not been extinguished.

The 1880 and 1911 deeds are recited in the findings of the Final Decree in the case of *United States of America as Guardian of the Indians of the Pueblo of Acoma v. Arviso, et al.*, No. 2079 In Equity in the United States District Court for the District of New Mexico, Final Decree filed May 14, 1931. The property described in those deeds, to the extent approved by the Secretary of Interior pursuant to § 17, was "quieted and set at rest as against the United States, the Pueblo of Acoma and the Indians thereof" by the terms of that Decree.

Acoma has no desire to halt the continuity of interstate communication systems and the services they provide. Acoma does wish to control its lands to the fullest extent, and to obtain full value for its use.

SUMMARY OF ARGUMENT

1. The 1924 Pueblo Lands Act language and legislative history clearly shows that Congress' purpose there-

in was to settle existing claims inside Pueblo boundaries. The complete statutory framework reveals that Congress intended to receive reports and recommendations from the Secretary of Interior (§§ 7, 8, 14, 15) for use in formulating future legislation, if necessary. The only grant of consent for future conveyance of Pueblo lands by the tribe and Secretary (§ 16) was limited to isolated parcels outside the "main body" of the Pueblo. § 17 is not clear language authorizing alienation. Except for claims meeting the § 4 standards, or conveyances meeting § 16 criteria, § 17 affirmed Congress' intent to articulate limits on both buyers and sellers, while reserving to itself ultimate control over Pueblo lands.

2. The administrative construction of the Act is immaterial because the statutory limits clearly do not authorize the actions taken under alleged authority of § 17. Even if, *arguendo*, the administrative acts were authorized, they are entitled to little or no deference because the delegation was not specific, Congress had no awareness of the agency's construction of the Section, Interior had no role in drafting § 17, and the 1928 Act completely addressed the subject of rights-of-way across Pueblo lands.

3. Estoppel by judgment principles should not allow the equity court actions to bar the present suit. The policy of repose must be balanced against the national interests of fairness to Indians and congressional limits on Executive power. The balance favors affirming the opinions below.

ARGUMENT

I. SECTION 17 OF THE PUEBLO LANDS ACT AFFIRMED THAT CONGRESS, TOGETHER WITH THE PUEBLO AND THE SECRETARY OF THE INTERIOR, MUST APPROVE CONSENSUAL ALIENATION OF PUEBLO LANDS AFTER JUNE 7, 1924.

One essential question which will be answered by this case construing § 17 of the Pueblo Lands Act (the Act) is the extent of federal approval required for alienation of Pueblo land. The Indian Trade and Intercourse Act of 1834, 4 Stat. 729, 730, Section 12, codified at 25 USC 177 requires the consent of the Indian nation, the Executive Branch, and one branch of Congress (the Senate, in its capacity to advise and consent to treaties). After Congress, in 1871, decided it would no longer make treaties with Indian nations, federal approval pursuant to the Non-Intercourse Act occurred by Acts of Congress, i.e. approval by both the House of Representatives and the Senate, with Executive branch approval.

While the power of Congress to impose a restriction on the right of alienation cannot be questioned, nevertheless an Act of Congress removing a restriction on alienation cannot give validity to a conveyance which, when executed, was void. *Smith v. Stevens*, 77 U.S. (10 Wall.) 321, 326-327, 19 L.Ed. 933 (1870). The use of § 17 to validate conveyances from Acoma made decades before passage of the 1924 Pueblo Lands Act clearly violates this rule.

§ 17 has been characterized as a statute supplementing the general restraint on alienation in 25 USC 177, enacted to "prohibit conveyances" with respect to the

Pueblos. Cohen, *Handbook of Federal Indian Law* (second edition, 1982), page 516.

A. Congress Intended the 1924 Pueblo Lands Act to Clear Up Land Title Uncertainty Then Existing Within The Exterior Boundaries of the Lands of the New Mexico Pueblos.

The court must determine "the most sensible view of the statutory framework." *Massachusetts Trustees v. United States*, 377 U.S. 235, 242, 12 L.Ed.2d 268 (1964).

In construing a statute, explicit references to certain subjects, and the absence of any such references to other, arguably similar subjects, "manifest the limited scope of the Act's underlying purpose. . . ." *Federal Power Commission v. Union Electric Co.*, 381 U.S. 90, 101, 14 L.Ed.2d 239 (1965), cited in *Chemehuevi Tribe of Indians v. Federal Power Commission*, 420 U.S. 395, 405, 43 L.Ed.2d 279, (1975).

The limited scope of an Act will be reflected in both the text of the Act and its legislative history. When there is simply no suggestion in any of the legislative materials that the Bill would authorize Petitioner's position, that construction must be rejected. *Id.* at 408.

The Pueblo Lands Act constituted "an effort to provide for the final adjudication and settlement of a very complicated and difficult series of conflicting titles affecting lands claimed by the Pueblo Indians of New Mexico." S.Rep. 492, 68th Cong., 1st Sess., (1924), (1924 S. Rep.) at 3, quoted in H.R. Rep. 787, 68th Cong., 1st Sess., (1924), (1924 H.R.Rep.) at 2. Neither report discussed rights of way.

Both reports support the construction of the Act adopted by the United States District Court and the Tenth Circuit Court of Appeals below. The "complicated questions" which the Bill sought to solve arose because

. . . in many cases Pueblos and individual Indians attempted to convey lands to non-Indians which under the decision of the Sandoval case [231 U.S. 28, 58 L. Ed. 107 (1913)] they were not competent to do. As a result of this situation, conflicts as to title and right to possession arose and exist in many instances. 1924 S.Rept. at 5.

Testimony developed before previous Congressional hearings on the Pueblos lands disclosed that there were

. . . approximately three thousand claimants to lands within the exterior boundaries of the Pueblo grants. The non-Indian claimants with their families comprise about twelve thousand persons. With few exceptions, the non-Indian claims range from a town lot of 25 feet front to a few acres in extent. *Id.* at 5.

Congress intended the complicated administrative and judicial procedures set forth in the 1924 Act to solve the existing land claims. Neither house of Congress intended that unsuccessful claims before the Pueblo Lands Board could be cured by Secretarial approval obtained under the authority of § 17.

In order to accommodate the interests of the non-Indians, and yet maintain its role as guardian of the Pueblos' land rights, Congress established very specific procedures intended both to allow the non-Indians to assert their claims and to protect the Pueblo lands from further encroachment.

A Pueblo Lands Board was established to investigate, determine and report on the land granted to or acquired

by each of the Pueblos, not including land title to which had been extinguished by adverse possession of non-Indians under other provisions of the Act. The Board was to be unanimous in any determination that Indian title had been extinguished (§ 2).

Upon the filing of said reports, the Attorney General of the United States was to file a quiet title suit to the lands therein described (§ 3).

Anyone claiming title to any of the lands involved in said quiet title action(s) might plead actual adverse possession, with or without color of title, and payment of taxes (§ 4).

A successful plea under § 4 would have the effect of a deed of quitclaim as against the United States and the Pueblos (§ 5).

The Board was to include in its reports the area, character, and value of any tracts of Pueblo lands in possession of non-Indian claimants and upheld under § 4. The United States was to be liable for the fair market value of any tracts lost by the lack of seasonable prosecution by the United States. The Board's decision was subject to judicial review (§ 6).

It thus appears that the two sections [§§ 4 and 6] in substance together provide for a *substantial effort to restore to the Indians the land and water rights which they have lost*, or equivalents therefor, and it is not sought to turn over to the Indians any monies to be expended by themselves. 1924 S.Rep. at 8 (emphasis added).

§ 7 requires the Board "to report to the Secretary of the Interior who shall report to the Congress" the fair

market value of lands, water rights, and improvements lost by non-Indians.

§ 8 further required the Board to report to the Secretary of the Interior "the area and the value of the lands and improvements appurtenant thereto of non-Indian claimants . . . title to which in such non-Indian claimants is valid and indefeasible." The report was to "include a finding as to the benefit to the Indians in anywise of the removal of such non-Indian claimants by purchase of their lands and improvements and the transfer of the same to the Indians, and the Secretary of the Interior shall report to Congress the facts with his recommendations in the premises."

§ 14 required the Secretary of the Interior to report to Congress the facts, including the area and value of the land, which any non-Indian party might successfully obtain based on a Spanish or Mexican grant. The Secretary was to report to Congress his recommendations in the premises for all such claims.

This paragraph of the Act indicates clearly the extent to which the effort has been made in drafting the Act to fully protect the Indian titles and also the extent to which in negotiations between representatives of the Indians and settlers the non-Indians have consented to go in conceding measures deemed necessary or advantageous in the protection of the Indians' interests. This is especially obvious to those who have knowledge of the history of these conflicting titles, the nature and extent of which it is needless to comment upon in this report. 1924 H.R.Rep. at 9 (emphasis added).

§ 15 of the Act specifically addresses the kinds of claims raised by Mountain Bell and the Atchison, Topeka and Santa Fe Railroad in the present case. That section

provided that when any claimant other than the United States for the Indians, not covered by the report provided for in Section 7, fails to sustain his claim to any parcel of land within any Pueblo Indian grant, but has *held and occupied such parcel in good faith claiming a right and has improved the same*, the value of the improvements upon said parcel of land shall be found by the Court and *reported to Congress by the Secretary of the Interior with his recommendations* in the premises. 1924 H.R.Rep. at 9 (emphasis added).

The claims of Mountain Bell and ATSF that the Board rejected should have gone before Congress, accompanied by Secretarial recommendations. Congress dealt with similar situations involving other claimants to Pueblo lands when it passed the 1926 and 1928 Pueblo alienation legislation.

Isolated parcels of Pueblo lands, removed from other Pueblo lands and located among lands awarded under the Act to non-Indians, might be sold by the Secretary of the Interior, under such regulations as he may make, if he deems it to be for the best interests of the Pueblos and secures the consent of the governing authorities of the Pueblos (§ 16).

The language in § 16 constitutes the Act's only clear consent to sell Pueblo lands, and grants authority to the Secretary to do so. The limitations on such sales are manifest, and contrast sharply with the language in § 17. § 16 allows sales of only lands "apart from the main body of the Indian land" and requires a Secretarial finding that the sale is "for the best interest of the Indians." Tribal consent was also required.

The 1924 committee reports each describe § 17 in identical language:

Section 17 provides that no right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished shall be hereafter acquired or initiated in any manner except as may hereafter be provided by Congress and that no sale or lease or other conveyance made by any Pueblo as a community or any Pueblo Indian living in a community of Pueblo Indians in the State of New Mexico shall be of any validity unless first approved by the Secretary of the Interior. 1924 S.Rep. at 11, 1924 H. Rep. at 10.

While this legislative history, particularly concerning § 17, is sparse, it nevertheless reveals the speculative nature of several arguments raised by the petitioner in this cause, and *amici curiae* supporting the Mountain Bell position. Congress recognized that the Pueblo land title problems arose "in many cases" because of attempted conveyances from Indians to non-Indians. 1924 S.Rep. at 5. *United States v. Wooten*, 40 F.2d 882, 885 (CA10, 1930) construed § 4 of the Act, discussing its intent. When ascertaining this factor, it found

where doubt exists the courts may, and should, look to the situation which confronted Congress. (Citations omitted) * * * Congress confronted a situation where people had purchased lands in reliance upon existing law, paid for them, and improved them, and claimed to own them. These people had strong moral claims which Congress expressly recognized by Section 4 of the Act. But Congress laid down the specifications for such claimants; if their proof measured up, their titles were good; if not, they were not. (emphasis added)

Both Mountain Bell's right-of-way in the present case, and the claims of ATSF and Mountain Bell described in Acoma's Statement of Interest failed to meet the statutory

criteria for extinguishing Pueblo title. Petitioner and its *amici* continue to argue for a strained construction of § 17 and for this Court to give these unsuccessful claimants before the Board another opportunity to circumvent its findings that their claims failed to meet the requirements of the Act. Such construction violates the rule that where an Act was meant to protect Indian interests, the court must construe the Act in the Indian's favor, and to reserve Congress' power to authorize alienation in the absence of clear statutory language to the contrary. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655-656, 48 L.Ed. 2d 274 (1976).

The reports required by §§ 7, 8, 14, and 15 demonstrate Congress' intent to reserve to itself ultimate control over the resolution of claims to ownership of Pueblo land. Petitioner's argument ignores this clear, though complex framework, and the intent to protect Pueblo interests, choosing to wrest § 17 out of context to buttress its position.

Furthermore, petitioner's argument that § 17 should be construed to permit loss of part or even all of the "main body" of a Pueblo's lands appears hard to accept, in light of § 16's allowing consensual alienation of only lands "apart from the main body of Indian land."

B. The Language of § 17 Clearly Shows Congressional Intent to Bar Future Loss of Pueblo Lands Without Subsequent Specific Congressional Authorization.

The 1924 statutory framework provided the exclusive means and full extent of Congressional approval for validating existing non-Indian claims and land uses within

Pueblo boundaries. § 17 thus limited Pueblo land losses to those “extinguished as hereinbefore determined” by the Board or the Federal Court pursuant to standards established in § 4.¹

The additional requirement in § 17 for approval by the Secretary of Interior for any conveyance by Pueblo need not be a “puzzle.” Pet. br. p. 17. While Congress clearly intended the Board and federal courts to settle existing claims against Pueblo lands, and allowed the sale of lands outside the Pueblo’s “main body,” with consent of the Secretary and the “governing authorities of the pueblo” (§ 16), all other actions involving Pueblo lands, whether equitable adjustment of existing claims (§§ 8, 15), or future needs by non-Indians for Pueblo lands (§ 17) would require additional legislation.

Secretarial review and approval of any “conveyances of land” by Pueblo Indians makes complete sense in light of the situation facing Congress in 1924. Improvident conveyances led to the existence of many of the 3000 claims against Pueblo lands. Even after disposing of those claims, Congress recognized the value of having future conveyances, even for consented to purposes, reviewed to assure that Pueblo people would not be victimized in the process of negotiation. This would insure that the Pueblo lands be treated as other “Indian lands” and that the

¹ “Since it should be generally assumed that Congress expresses its purposes through the ordinary meaning of the words it uses, we have often stated that ‘[a]bsent a clearly expressed legislative intention to the contrary [statutory] language must ordinarily be regarded as conclusive.’” *Escondido Mutual Water Company v. La Jolla Indians*, — U.S. —, 80 L.Ed.2d 753, 761 (1984).

Pueblo Lands Act be understood as a singular transfer of Pueblo titles to non-Indians.

The two parts of § 17 joined by “and” do not represent alternative methods of acquiring interests in Pueblo lands, but the reciprocal parts of any alienation thereof.

The first part concerns the acquisition of an interest in Pueblo lands. Non-Indians cannot acquire an interest in Indian lands without federal authorization. *Worcester v. Georgia*, 31 (6 Pet.) U.S. 515, 544, 8 L.Ed. 483 (1832). The language of this part refers exclusively to the party acquiring an interest in Pueblo land and such acquisition cannot take place “except as hereafter provided by Congress.”

The second part concerns the consent by the Pueblos to relinquish their interest and approval thereof by the Secretary. The language of this part refers exclusively to the tribal and federal parties relinquishing their interest in Pueblo land. See *Alonzo v. United States*, 249 F.2d 189, 197 (CA10, 1975), cert. den. 355 U.S. 940 (1958).

II. THE ADMINISTRATIVE CONSTRUCTION OF SECTION 17 BEING UNAUTHORIZED BY THAT SECTION, INCONSISTENT THEREWITH AND NOT THE RESULT OF ANY DELEGATED AUTHORITY, IS NOT ENTITLED TO DEFERENCE.

If Congress’ intent be clearly expressed by statute, any opinion or action of the administering agency, indicating a different view, is immaterial. *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. —, 81 L.Ed.2d 694, 703 (1984). Administrative construction contrary to Congressional purpose must be rejected by the

judiciary, the final authority on issues of statutory construction. *Federal Elections Committee v. Democrats Senatorial Campaign Committee*, 454 U.S. 27, 32, 70 L.Ed. 2d 23 (1981).

Where the statute is ambiguous or silent with respect to the matter at issue, the court may consider permissible constructions placed on it by the agency, but only when the agency interpretation is consistent with the agency's congressional authorization. *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24, 70 L.Ed.2d 792 (1982). The administrator acts only on the basis of statutory authority and cannot expand or alter such authority from that given in the statute. *Guardians Assn. v. Civil Service Commission of the City of New York*, — U.S. —, 77 L.Ed.2d 866, 890 (O'Connor concurring) (1983). He may neither expand his power beyond that given nor assume power not provided for. *United States v. George*, 228 U.S. 14, 20, 57 L.Ed. 712 (1913).

Repeated violation by an agency of its statutory mandate will not validate its ultra vires acts. *F.M.C. v. Seatrain Lines, Inc.*, 411 U.S. 726, 745, 36 L.Ed.2d 620 (1973); *Pittston Stevedoring Corp. v. Delaventura*, 544 F.2d 35, 50 (CA 2 1976); affirmed *sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 53 L.Ed.2d 320 (1977); *Pratt and Whitney Aircraft v. Donovan*, 715 F.2d 57, 62 (CA 2 1983).

The decision as to the limits of an agency's statutory power is a judicial, not an administrative function. *Batterton v. Francis*, 432 U.S. 416, 424-425, 53 L.Ed.2d 448

(1977)². Particularly where, as here, the question is one of interpreting a statutory term, the courts are the specialists and freely substitute their judgment for that of the administrative agencies. *Pittston, supra* at p. 49. On such matters the courts are the final authorities, *Federal Election Committee, supra*, at p. 42, since deciding what a statute means is a quintessential judicial function. *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, —U.S. —, 78 L.Ed.2d 195, 203, fn. 8 (1983).

The actions of the agency in confirming old deeds and granting rights-of-way under purported authority of §17 were contrary to the purpose of the Pueblo Lands Act and exceeded its authority. Under these circumstances, the administrative construction is not entitled to deference. There is no evidence of any legislative purpose supporting the administrative interpretations of § 17. § 4 set forth the only standards for extinguishment of Indian title under the Act. Unsuccessful claimants could either seek tribal and secretarial approval for conveyances of lands isolated from the "main body" of the Pueblo (§16) or seek secretarial recommendation for congressional consent to extinguishment of Indian title under §15.

The desired finality and preclusiveness could not be achieved if claims which failed under the Act could there-

² Where the question concerns an agency interpretation involving an exercise of authority appearing to expand the limits of the agency's statutory power, the courts need not be deferential. "... the determination of the extent of authority given to a delegated agency by Congress is not left for the decision to him in whom authority is vested." *Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 616, 88 L.Ed. 1488 (1944).

after be revived under §17. Yet that is what occurred in the present case and what the administrative construction represented. The rights-of-way over the Santa Ana and Acoma Pueblos as well as others in place before 1924 were not sustained by the Board but later were approved upon the advice and signature of the administrators. In fact, under Petitioner's interpretation, every one of the approximately 3000 claimants to Pueblo land could have used this procedure.

Likewise, the legislators had no motive to use §17 as a means of conveying rights-of-way. There is no evidence that Congress or the agency believed in 1924 that rights-of-way over Pueblo lands could not be acquired under the Indian Right-Of-Way Act of 1899 (30 Stat. 990), 25 USC 312 et seq. In 1924 application for rights-of-way through Santa Ana, Jemez, and Zia Pueblos were approved under that Act. A railroad secured rights-of-way over San Felipe Pueblo in 1904 and 1922 under the same Act (Kelly, "Section 17 of the Pueblo Lands Act: A Study of Legislative History and Administrative Practice" pp. 20-21).

The administrative decision to use §17 in securing rights-of-way derived not from any reading of the legislative purpose, but from the dilemma which faced the agency and those seeking rights-of-way when the Board determined that the Pueblo lands, because of the nature of their titles, were not subject to the 1899 Act³. This left no means for securing rights-of-way across Pueblo lands and also meant that the numerous rights-of-way in exist-

³ The Pueblos held their land in fee simple communal title and it was believed that this made them not subject to acts addressing Indian Reservations.

ence were without legal support. Congress acted promptly. Act of May 10, 1926, 44 Stat. 498 (1926); and Act of April 21, 1928, 45 Stat. 442, 25 USC 322 (1928).

Just as the courts must determine whether the administrative acts are authorized by the statute in the first place, having so concluded, they must then decide the degree of deference merited by the circumstance. *Federal Elections Committee, supra*, at p. 42. "The Court may not . . . abdicate its ultimate responsibility to construe the language employed by Congress." *Zuber v. Allen*, 396 U.S. 168, 193, 24 L.Ed.2d 345 (1969).

Where Congress explicitly authorizes an agency to develop specialized expertise in its field and to use that expertise to give content to the goals and principles of the act, the agency is entitled to considerable deference when it exercises its special function of applying the general provisions of the act to the complexities of its area of expertise. *Bureau of Alcohol, supra*, at 202 (1983). In the formal context of rulemaking, regulations resulting from such explicit congressional delegation receive controlling weight unless they are arbitrary, capricious or contrary to the statute. *United States v. Morton*, 467 U.S. —, 81 L.Ed.2d 680, 691 (1984). However, even in these circumstances of maximum deference, the courts have a duty to prevent ". . . unauthorized assumption by an agency of major policy decisions properly made by Congress." *American Ship Building Co. v. NLRB*, 380 U.S. 300, 318, 13 L.Ed.2d 855 (1965), quoted in *Bureau of Alcohol, supra*, at 202. They must not ". . . rubberstamp . . . administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S.

278, 291-292, 13 L.Ed.2d 839 (1965), quoted in *Bureau of Alcohol, supra* at 202⁴.

The degree of deference varies with the comparative qualifications of the agency and the court to decide the particular question (degree of specialized expertise required and possessed by the agency) and the nature, scope and specific exercise of the authority committed to the agency by the statutory authorization.

A regulation issued under a specific grant of authority to define a statutory term or prescribe a method of executing a statutory provision is entitled to greater deference than one issued under a more general delegation. *Vogel Fertilizer, supra*, 24. Compare *Federal Election*

⁴ Although the judiciary will accord substantial deference to an agency's interpretation of its authority where Congress has specifically delegated the power to make substantive determinations within a circumscribed subject area, the courts must determine the extent of statutory authorization and "... must reject administrative constructions ... that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement." *Federal Election Committee, supra* at 42; *Morton v. Ruiz*, 415 U.S. 199, 237, 39 L.Ed.2d 270 (1974). The power to abridge or enlarge a statute is a legislative not administrative function. Administrative intrusion into the realm of Congress is not justified by its reasonableness. *United States v. George, supra*, 21-22 (1913), cited in *Guardian Assn., supra*, 889. Deference to an agency's views is "... constrained by an obligation to honor the clear meaning of a statute, as revealed by its language, purpose, and history." *Southeastern Community College v. Davis*, 442 U.S. 397, 411, 60 L.Ed.2d 980 (1979), quoting from *Teamsters v. Daniel*, 439 U.S. 551, 556, 58 L.Ed.2d 808 (1979). Although an administrative interpretation is not invalid simply because the language of the statute will support a contrary interpretation, it is not to be sustained simply because it is not "technically inconsistent with the statute when it is fundamentally at odds with the manifest congressional design. It must harmonize with the statute's 'origin and purpose'." *Vogel Fertilizer, supra*, 26.

Committee, supra, 37, with *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-142, 50 L.Ed.2d 343 (1976).

There being no specific delegation of authority to the agency in the present circumstance, the degree of deference merited, if any, is slight.

Furthermore, there is no evidence that Congress was even aware of or ratified the agency construction in the present case.

Varying degrees of deference are accorded to administrative interpretations, based on such factors as the timing and consistency of the agency's position and whether it participated in the drafting of the governing statute. In essence these are further measures of the conformity between the administrative interpretation and congressional view since they generally judge the degree to which the legislature relied upon, ratified and/or was aware of the agency's interpretation. Thus, deference is influenced by the consistency of the interpretation with earlier and later agency positions *Morton v. Ruiz, supra*, and is "... applicable in instances where ... an agency has rendered binding, consistent, official interpretation of its statutes over a long period of time." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41, fn. 27, 51 L.Ed.2d 124 (1977); *Udall v. Tallman*, 380 U.S. 1, 16-17, 13 L.Ed.2d 616 (1965). These principles have particular force where the agency was intimately involved in the drafting of the applicable legislation and thereafter was expressly delegated the responsibility of setting its machinery in motion. *Aluminum Co. v. Cent. Lincoln Peoples Util. Dist.*, — U.S. —, 81 L.Ed.2d 301, 310 (1984); *Blum v. Bacon*, 457 U.S. 132, 141, 72 L.Ed.2d 728 (1982); *Zenith Radio Corp. v. United*

States, 437 U.S. 443, 450, 57 L.Ed.2d 337 (1978). If there is insufficient evidence that Congress was aware of the administrative interpretation, then the deference is not merited. *Zuber v. Allen*, *supra*, 193.

There is no evidence that the agency participated in the drafting of §17. Since the agency still believed in 1925 that the 1899 Act applied to the Pueblos, it had no reason to seek authority to approve rights-of-way. §17, under the Defendants' view would have repealed that Act as to any rights-of-way across Pueblo lands. No one intended that result.

Likewise, there is no evidence that Congress was aware of or in any manner, ratified the agency's administrative construction. In 1926 and 1928 Congress passed rights-of-way acts specifically directed at Pueblo lands. The 1926 Act was an emergency measure, found defective, supplemented and perhaps repealed by the 1928 Act. The 1928 Act applied the 1899 Act to Pueblo lands. In sharp contrast to §17, it includes detailed specifications for the granting of rights-of-way.

The 1928 Act constituted a comprehensive scheme which completely covered the subject of rights-of-way over Pueblo lands. *Plains Electric Gen. and Transmission Coop. v. Pueblo of Laguna*, 542 F.2d 1375, 1379 (CA10 1976). The fact Congress applied such a comprehensive scheme to the subject, just four years after the enactment of §17, making the Agency construction of that section superfluous, without mentioning the Section shows a lack of knowledge of the agency interpretation.

The failure of Congress to object to the agency construction lends no support to the Defendants' position.

"Unless Congressional repudiation of a specific practice has been sought and denied, to rely on an administrative practice, of which there is no indication that Congress was aware, is to elevate Congressional inaction to positive legislative decision." *Wade v. Lewis*, 561 F. Supp. 913, 944 (N.D. Illinois, E.D., 1983). Congressional silence is a weak basis for implying ratification of an agency interpretation. *Ibid*. See also *Baltimore & Ohio Railway v. Jackson*, 353 U.S. 325, 330-331, 1 L.Ed.2d 862 (1957), *Girouard v. United States*, 328 U.S. 61, 69, 90 L.Ed. 1084 (1946).

III. AN EQUITY SUIT FILED AND CONCLUDED UNDER § 3 OF THE 1924 ACT DOES BAR THIS ACTION.

In 1928, the Assistant Secretary of the Interior approved pursuant to § 17, an agreement between the Pueblo of Santa Ana and Mountain Bell for a right-of-way across the Pueblo's land. The United States then requested and received an Order dismissing Mountain Bell from the quiet title action filed under § 3 of the Pueblo Lands Act. The basis of the order was the easement approved pursuant to § 17. *United States v. Brown*, No. 1814 Equity (D.N.M. 1928). In *United States v. Arviso*, No. 2079 Equity (D.N.M. 1931), the United States by a consent decree agreed to quiet title in ATSF for lands described in deeds executed in 1880 and 1911 by the Pueblo de Acoma and approved by the Secretary of Interior in 1931. Secretarial approval was under the authority of § 17. Jurisdiction in both court proceedings was limited to a quiet title action brought by the Attorney General on the basis of a report filed by the Board.

The courts below correctly rejected the arguments of res judicata and collateral estoppel after holding the con-

tract between the Santa Ana and Mountain Bell invalid under § 17 in the absence of congressional action. The balancing of national interests involved here make estoppel by judgment inappropriate where the district court in quiet title actions filed pursuant to § 3 of the 1924 Pueblo Lands Act made "no effort to decide the validity of the agreement." *Pueblo of Santa Ana v. Mountain States Telephone and Telegraph Co.*, 734 F.2d 1402, 1407 (CA10 1984).

The doctrine of collateral estoppel or issue preclusion generally will not bar subsequent litigation when a party asserts the absence of a "full and fair opportunity" to litigate that issue in a prior suit. *Allen v. McCurry*, 449 U.S. 90, 95, 66 L.Ed.2d 308 (1980). The issue of whether § 17 authorizes alienation of Pueblo lands, notwithstanding the failure of the claimants before the Board, never received consideration by the district courts in the equity actions. The court merely accepted a motion to dismiss in *Brown* and a consent decree in *Arviso*, both based on the assumption that the conveyance had occurred. For reasons set forth in the district and circuit court opinions below and advanced in Point I of this brief the purported conveyances were void ab initio. Thus, application of estoppel principles against the Pueblos would sanction illegal acts by the Secretary of Interior. This Court should carefully weigh "the policies supporting res judicata and collateral estoppel in assessing the preclusive effect of decisions of other federal courts" i.e. the equity actions. *Allen v. McCurry*, *supra*, at 96.

Redetermination of the title extinguishment issue is proper here because there is "reason to doubt the quality, extensiveness or fairness of the procedures followed in

prior litigation." *Montana v. United States*, 440 U.S. 147, 164 n.11, 59 L.Ed.2d 210 (1979).

The record in the equity suits shows no evidence introduced on the claims of Mountain Bell or ATSF. Instead we find the Board rejected the specific land use claims later "approved" by the Secretary of Interior and mentioned by the district court without examination, consideration or approval. The unfairness to the Pueblo in barring consideration of the issue outweighs the inconvenience to the claimants in the present litigation. They now, as then, rely on paper title obtained from illiterate Indians. Spirited negotiations may cost money, but no one expects the railroad line to be relocated to mountaintops as a result.

For collateral estoppel to bar a non-party, the non-party must have had a sufficient "laboring oar" in the prior controversy. *Drummond v. U.S.*, 324 U.S. 316, 318, 89 L.Ed. 969 (1945), cited in *Montana v. U.S.*, *supra*, at 155. This should not be easily inferred in Indian cases. While no one would argue that the Pueblos had such a role in the equity suits, Petitioners and their *amici* rely on *Nevada v. U.S.*, — U.S. —, 77 L.Ed.2d 509 (1983), to support the argument that the United States can appear and thereby bind the Pueblos. *Nevada* barred reconsideration of the measure of water rights under the doctrine of res judicata in a water rights adjudication instituted by the United States and lasting over 30 years, which raised the very issues the U.S. and the Indians sought to litigate in the later suit. The opinion discussed the "same cause of action" and "same parties" inquiries of the res judicata doctrine, and held "that the Tribe, whose interests were

represented in *Orr Ditch* by the U.S., can be bound by the *Orr Ditch* decree." *Id.* at 24.

The principle of finality so emphasized in *Nevada* nevertheless remains subject to a balance of interests. Justice Rehnquist's opinion collects recent cases discussing both collateral estoppel and *res judicata* in diverse contexts, subsuming them into "principles of estoppel by judgment." *Id.* at 17. *Res judicata* or "claim preclusion" is proper "only after careful inquiry." *Brown v. Felsen*, 442 U.S. 127, 132, 60 L.Ed.2d 767 (1979). *Felsen*, the only recent case cited by Justice Rehnquist which involved a stipulation and consent judgment, allowed the bankruptcy court to hear extrinsic evidence on the fraud and misrepresentation issues associated with the claims underlying the consent judgment.

The public policy supporting *res judicata* relies ultimately on a "contest" of the claim before bar becomes proper, and the claim considered "forever settled." *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 69 L.Ed.2d 103 (1981). This Court should not close the door on cases involving "overriding concerns of public policy and simple justice." *Id.*, 403 (Blackmun concurring).

The overriding policy concern in the present case is whether an Executive officer can alienate Pueblo land without clear and explicit congressional approval. Using estoppel by judgment rhetoric to uphold administrative action contrary to a statutory framework does not outweigh the detrimental precedent of sanctioning collaboration between Interior officials and a handful of unsuccessful claimants before the Pueblo Lands Board by unswerving judicial devotion to the finality purpose. Simple jus-

tice to the Pueblos also cries out for an opportunity to litigate their title claim now.

In *Nevada, supra*, "the only conclusion allowed by the record . . . is that the Government was given an opportunity to litigate . . . and that the Government intended to take advantage of that opportunity", 525. The evidence herein shows the U.S. did not intend to "take advantage of that opportunity" to vindicate the Pueblo's title, despite the 1924 Act which made all non-Indian claimants trespassers, unless they met the standards set forth in § 4 of the Act.

Here we have neither the multiple statutory responsibilities, nor the numerous parties affected which the Court found so persuasive in *Nevada*.

Unlike the circumstances of *Nevada, supra*, 523, the strong fiduciary duty of the United States to represent fully the interests of the Pueblos was not mitigated by legislation imposing a duty to represent others. There is no question here of the judiciary's questioning the policy choices of the political arm of the government. There is only the question of whether the U.S. in the *Brown* case diligently and with reasonable prudence represented the interests of the Pueblo, and whether the U.S. fairly and equitably implemented the statutory scheme of the Pueblo Lands Act. If the U.S. failed on either ground the Pueblo should not be precluded from raising the issues of the present case. *Restatement (Second) of Judgments* (1982) § 26(1)(d) and § 42(1)(e).

By its arrangements with Mountain Bell and the ATSF to secure rights-of-way across Pueblo land without statutory authority, the U.S. clearly violated its duty as trustee to act solely in the interests of the beneficiary.

Restatement (Second) of Trusts, § 170. The standards for a waiver of claim by the Pueblos were not met in the *Brown* and *Arviso* cases. *United States v. Pueblo of Taos*, 515 F.2d 1404, 1407 (Ct. Cl. 1975). The U.S. also ignored the statutory scheme of the Act to protect Pueblo lands from further alienation until subsequent congressional authorization (See pp. 6-11).

The Pueblos should not be considered "in privity" with the United States for res judicata purposes. It should not be held consistent with any principle of public policy or simple justice that statutory violations by Interior officials for the benefit of a handful of railroads and utilities can preclude a Pueblo from asserting rights upheld by the Board and collusively abjured before the equity court. Res judicata principles are intended to advance repose, not reward unlawful behavior. The policy of repose is not absolute; careful judicial inquiry and balancing against procedural due process limits and congressional purpose are required. The present case is especially appropriate for articulating a limit on the extent of estoppel by judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

PETER C. CHESTNUT
620 Roma N.W.
Suite D
Albuquerque, NM 87102
(505) 842-6060
Attorney for Amicus Curiae
Pueblo de Acoma

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No. 84-262

Office - Supreme Court, U.S.

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ALEXANDER L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY,
Petitioner,
VS.
PUEBLO OF SANTA ANA,
Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Tenth Circuit

**BRIEF *AMICI CURIAE* OF THE ALL INDIAN
PUEBLO COUNCIL, PUEBLO OF ISLETA,
PUEBLO OF SANDIA, PUEBLO OF SANTA
CLARA, PUEBLO OF SAN JUAN, PUEBLO OF
LAGUNA, AND PUEBLO OF JEMEZ, IN SUPPORT
OF THE POSITION OF THE RESPONDENT**

L. LAMAR PARRISH, ESQ. AND
CATHERINE BAKER STETSON, ATTORNEY
USSERY & PARRISH, P.A.

P. O. Box 487

Albuquerque, New Mexico 87103

Attorneys for *Amici Curiae*,

All Indian Pueblo Council, Pueblo of

Isleta, Pueblo of Sandia, Pueblo of

Santa Clara, Pueblo of San Juan,

Pueblo of Laguna, and Pueblo of Jemez

QUESTION PRESENTED

Did Section 17 of the Pueblo Lands Act of June 7, 1924, permit New Mexico Pueblos, with the approval of Secretary of Interior, to alienate or convey interests in their land without the sanction of a further Congressional enactment, and did Section 17 authorize the Secretary of Interior to approve such alienations or conveyances?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
SECTION 17 OF THE PUEBLO LANDS ACT DID NOT PERMIT NEW MEXICO PUEBLOS TO ALIENATE OR CONVEY INTEREST IN THEIR LANDS AND DID NOT AUTHORIZE THE SECRETARY OF INTERIOR TO APPROVE SUCH ALIENATIONS OR CONVEYANCES. . .	4
A. Historically, the Pueblo Indians were unable to alienate their land without governmental consent and supervision.	5
B. Section 17 parallels the Non-Intercourse Act in prohibiting alienation of tribal lands without Congressional action.	7
C. The two clauses of Section 17 are conjunctive, complementary, and clear.	9
D. Section 17 does not make Secretarial approval the only prerequisite to a valid conveyance of Pueblo land, nor does Section 17 authorize the Secretary to approve such conveyances.	11
E. Section 17 required additional Congressional action for the acquisition of any right, title, or interest in and to Pueblo land.	15
F. The administrative interpretation contradicts both the language and purpose of the Pueblo Lands Act and is a violation of the trust responsibility of the United States.	16
G. Section 17 is not limited to rights-of-way.	19
CONCLUSION	20
APPENDICES	1a
APPENDIX 1	1a
APPENDIX 2	9a

TABLE OF AUTHORITIES

CASES CITED	Page
<i>Alonzo v. United States</i> , 249 F.2d 189 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958).	8
<i>Bryan v. Itasca Cty., Minnesota</i> , 426 U.S. 373 (1976) .	10, 14
<i>Cherokee Nation v. Georgia</i> , 30 U.S. (5 Pet.) 1 (1831) .	18
<i>DeCoteau v. District County Court</i> , 420 U.S. 425 (1975)	11
<i>Federal Maritime Commission v. Seatrain Lines, Inc.</i> , 411 U.S. 726 (1973).	16
<i>Mohegan Tribe v. State of Connecticut</i> , 638 F.2d 612 (2nd Cir. 1981), cert. denied, 452 U.S. 968 (1981)	14, 17
<i>Morrison v. Work</i> , 266 U.S. 481 (1924).	18
<i>Navajo Tribe of Indians v. United States</i> , 364 F.2d 320 (Ct.Cl. 1966)	18
<i>Northern Cheyenne Tribe v. Hollowbreath</i> , 425 U.S. 649 (1976).	10
<i>Oneida Indian Nation v. County of Oneida</i> , 414 U.S. 661 (1974)	14
<i>Plateau, Inc. v. Department of Interior</i> , 603 F.2d 161 (10th Cir. 1979).	16
<i>Pueblo of Isleta v. James Watt, et al.</i> , No. CIV-82-1504C (D.N.M.)	19
<i>Pueblo of Sandia v. James Watt, et al.</i> , No. CIV-82-1536M (D.N.M.)	19
<i>Pueblo of Santa Ana v. Mountain States Telephone & Telegraph Co.</i> , 734 F.2d 1402 (10th Cir. 1984)	5, 6
<i>Rice v. Rehner</i> , — U.S. —, 103 S.Ct. 3291 (1983)	10-11
<i>S.E.C. v. Sloan</i> , 436 U.S. 103 (1978)	16
<i>Seminole Nation v. United States</i> , 316 U.S. 286 (1942)	17, 18
<i>Southern Pacific Transp. Co. v. Watt</i> , 700 F.2d 550 (9th Cir. 1983).	13, 14
<i>State of New Mexico v. Aamodt</i> , 537 F.2d 1102 (10th Cir. 1975), reh. denied (1976)	6
<i>Touche Ross & Co. v. Redington</i> , 442 U.S. 560 (1979) .	10

Table of Authorities (Continued)

	Page
<i>U.S. v. Candelaria</i> , 271 U.S. 432 (1926)	5, 7
<i>U.S. v. Joseph</i> , 94 U.S. 614 (1876)	6
<i>U.S. v. Kagama</i> 118 U.S. 375 (1886)	18
<i>U.S. v. Lucero</i> , 1 NM 422 (1869).	6
<i>U.S. v. Sandoval</i> , 231 U.S. 28 (1913).	6, 20
<i>U.S. v. Santa Fe Pac. R. Co.</i> , 314 U.S. 339 (1941), <i>reh. denied</i> (1942).	10
<i>U.S. v. University of New Mexico</i> , 731 F.2d 703 (10th Cir. 1984)	6
<i>U.S. on behalf of the Pueblos of Acoma, Isleta, Jemez, Laguna, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Clara, Santo Domingo, Tesuque, Taos, and Zia vs. Mountain States Telephone and Telegraph Company and Continental Telephone Company of the West</i> , No. CIV-82-1513C (D.N.M.)	17
<i>U.S. on behalf of the Pueblos of Santa Clara and San Ildefonso vs. Jemez Mountain Electric Cooperative</i> , No. CIV-82-1482 M (D.N.M.)	17
<i>Zuber v. Allen</i> , 396 U.S. 168 (1969)	16
FEDERAL STATUTES AND REGULATIONS CITED	
Indian Trade and Intercourse Act of 1834, 4 Stat. 729, 25 USC Section 177	<i>passim</i>
Treaty of Guadalupe-Hidalgo, Act of February 2, 1848, 9 Stat. 922	5
Act of February 27, 1851, ch. 14, 9 Stat. 587	6
Act of March 3, 1873, ch. 120, 16 Stat. 566, 25 USC 71.	8
Act of March 2, 1899, ch. 374, 30 Stat. 990, 25 USC 311-18.	8, 14
Act of March 3, 1901, ch. 832, 31 Stat. 1083, 25 USC 311, 319.	14
Appropriations Act of March 3, 1905, 33 Stat. 1048, ch. 1479	6

Table of Authorities (Continued)

	Page
New Mexico Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557	6, 15
Act of June 7, 1924, ch. 331 (Pueblo Lands Act) 43 Stat. 636, <i>et seq.</i> ,	<i>passim</i>
Act of May 10, 1926, ch. 282, 44 Stat. 498	16, 19
Act of April 21, 1928, ch. 400, 45 Stat. 442, 25 USC 322	14, 16, 19
Act of February 5, 1948, ch. 45, 62 Stat. 17-18, 25 USC 323-28.	14, 16, 19
United States Code, Title 25	13
25 USC Section 311, <i>et seq.</i>	13
25 USC Section 319	13
25 USC Section 320	13
25 USC Section 321	13
25 USC Section 323	13
25 USC Section 396a-396g	13
25 USC Section 399	13
25 USC Section 400	13
25 USC Section 400a	13
25 USC Section 402-402a	13
25 USC Section 403a	13
25 USC Section 403b-403c	13
25 USC Section 407	13
25 USC Section 415	13
25 USC Section 416-416j	13
25 USC Section 641-646	13
25 CFR Subchapters H and I	9
MISCELLANEOUS	
F. Cohen, <i>Handbook of Federal Indian Law</i> (1942) ...	5
<i>Pueblo Indian Lands: Hearings on S. 3865 and S. 4223 Before a SubComm. of the Senate Comm. on Public Lands and Surveys</i> , 67th Cong. 4th Sess. (1923) .	13

**BRIEF AMICI CURIAE OF ALL INDIAN PUEBLO
COUNCIL, PUEBLO OF ISLETA, PUEBLO OF SANDIA,
PUEBLO OF SANTA CLARA, PUEBLO OF SAN JUAN,
PUEBLO OF LAGUNA, AND PUEBLO OF JEMEZ**

The *amici curiae*, the All Indian Pueblo Council (hereinafter "AIPC") and the Pueblo of Isleta, Pueblo of Sandia, Pueblo of Santa Clara, Pueblo of San Juan, Pueblo of Laguna, and Pueblo of Jemez (hereinafter "Pueblos") respectfully request that this Court affirm the decision of the United States Court of Appeals for the Tenth Circuit, declaring invalid certain rights-of-way approved by the Secretary of Interior pursuant to Section 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 (hereinafter referred to as "the Act" or "the Pueblo Lands Act.") Petitioner and Respondent have consented in writing to the filing of this brief in support of Respondent.

INTEREST OF THE AMICI CURIAE

All Indian Pueblo Council ("AIPC") is a non-profit corporation composed of and organized to represent eighteen of the nineteen Pueblo Indian tribes in the State of New Mexico. The Pueblos of Isleta, Sandia, Santa Clara, San Juan, Laguna, and Jemez ("the Pueblos") are individual, federally-recognized Indian tribes located within the exterior boundaries of the State of New Mexico. The Pueblos were the beneficiaries of the Pueblo Lands Act, the interpretation and application of which is at issue.

The decision below, by invalidating rights-of-way obtained under Section 17 (hereinafter "Section 17") of the Pueblo Lands Act, confirmed the Pueblos' contention that such rights-of-way were in trespass. It further confirmed hundreds of years of consistent legislation, custom, and case law which protect the Pueblos in their capacity as wards of their fiduciaries, the United States of America and earlier

sovereigns. A reversal of the decision below would throw the status of Pueblo lands into question, once again recreating the sort of turmoil which the Pueblo Lands Act was specifically intended to remedy.

Each of the Pueblos has challenged the validity of Section 17 rights-of-way across its lands. While a majority of the resultant lawsuits have been settled or dismissed or are being settled, a few are in an abated status, pending a decision by this Court.¹ The decision in the instant case will affect the Pueblos' interests in such cases. More importantly, the decision in the instant case may have a profound effect on the nature, scope, and extent of Pueblo control over and title to tribal lands in the future.

SUMMARY OF ARGUMENT

The primary issue in this case is the effect of Section 17 of the Pueblo Lands Act. This Court's ultimate resolution of the issue is critical, less because of its resolution of past disputes than because of the profound impact it will have on the nature and status of all Pueblo lands and, therefore, on the very future of the Pueblos themselves.

Past trespass damages, whether awarded or denied, will not have a very significant effect on the Petitioner, the rights-of-way grantees, or any of the Pueblos; such damages are generally nominal, at best. For this Court to find that all Section 17 conveyances were invalid would not have the effect of unsettling of land titles, as most Section 17 grantees

¹Of the sixteen lawsuits named in Appendix F to the Petition for Certiorari, Nos. 13 and 16 were erroneously listed and do not involve Section 17 trespasses. Of the remaining fourteen suits, nine are settled and dismissed or are being settled (Nos. 1, 3, 4, 6, 7, 8, 9, 12, and 14). The only ones remaining to be litigated are two against the United States (Bureau of Reclamation), two against the *amicus* Railroad, and one against the New Mexico State Highway Commission.

have never gotten title to Pueblo land but have only received permission to cross or use such lands for specific purposes.

A decision that Section 17 conveyances are invalid would not result in the removal of utility lines from the contested rights-of-way, and would not interrupt train service or interfere with transportation and commerce in the Southwest. Rather, the Petitioner and the other grantees of Section 17 rights-of-way would merely be required to make proper application to the local Department of Interior agency office for valid rights-of-way. Such are granted regularly and as a matter of course. The cost of rights-of-way is generally based on figures and appraisals made by a United States government agency, and negotiations and final transactions are overseen by and subject to approval of the Secretary of Interior. The inconvenience to Petitioner and to *amicus* entities exists, but the chaos and deprivation described in the briefs filed heretofore are fantasized.

For this Court to rule, however, that Section 17 permits the Pueblo tribes to sell, grant, and convey their lands, without statutorily-designated Federal supervision, would result in chaos and disruption in New Mexico virtually identical to that existing in the early part of this century. Such a ruling would place the Pueblo Indians of New Mexico in a status unlike that of any other of the federally-recognized tribes in the United States, all of which are required to go through Congressionally mandated procedures and Federal regulations to grant rights-of-way and other conveyances, and none of which are permitted to sell their lands. Such a decision by this Court would exempt the Pueblo Indians of New Mexico from the Federal requirements and would thus strip them of the Federal protection experienced by other tribes. In addition, it would reward the United States Government for breaching its fiduciary obligation as trustee to the Pueblos, for the United States

has dealt with Pueblo lands to its own benefit and in derogation of its responsibility as protector of such lands.

ARGUMENT

Section 17 of the Pueblo Lands Act did not permit New Mexico Pueblos to alienate or convey interest in their lands and did not authorize the Secretary of Interior to approve such alienations or conveyances.

Introduction

The first sixteen (16) sections of the Pueblo Lands Act dealt with the procedures for quieting title to lands in New Mexico within the Pueblo Indian land grants. Section 17 looked to the future:

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto made by any pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

Construction of this single sentence is the central issue, not because it is ambiguous but because it has been wrongfully and abusively applied. The language did not authorize Petitioner's predecessors in interest to acquire Pueblo land, so they stretched the language to imply such permission. Now that Petitioner has been challenged, it seeks to justify

its position through a creative but perverse construction of the language of Section 17.

There is no need to second guess the Congress which wrote the sentence, there is no need to "imply" a meaning, and there is no need to search through a virtually non-existent legislative history and contemporaneous letters. The sentence, indeed, "means exactly what it says," as the Tenth Circuit recognized. *Pueblo of Santa Ana v. Mountain States Telephone & Telegraph Co.*, 734 F.2d 1402, 1406 (10th Cir. 1984). After discussing the procedures for quieting title to the Pueblo lands, the Pueblo Lands Act, in Section 17, provided that no right, title, or interest of any kind to Pueblo lands would be acquired in any way except as may thereafter be provided by Congress. In addition, no voluntary conveyances of land by any Pueblo would be valid unless first approved by the Secretary of Interior. Section 17 contemplated future Congressional action to provide the vehicle(s) for such land conveyances, and Congress has in fact responded with several Acts authorizing such conveyances pursuant to statutorily-designated Federal supervision. Section 17 itself, however, did not and does not today provide a proper means for effecting Pueblo land conveyances.

A. Historically, the Pueblo Indians were unable to alienate their land without governmental consent and supervision.

For three or four hundred years, the lands of the Pueblo Indians have been protected and to some degree controlled by the reigning sovereign. F. Cohen, *Handbook of Federal Indian Law*, pp. 383-84 (1942). Under Spanish and Mexican rule, the Pueblo Indians could alienate their lands only with governmental consent and supervision. *U.S. v. Candelaria*, 271 U.S. 432, 442 (1926). When New Mexico was ceded to the United States in 1848, the Treaty of Guadalupe-Hidalgo,

Act of February 2, 1848, 9 Stat. 922, guaranteed the protection of existing Pueblo property rights; in other words, the Pueblos remained wards of the sovereign and remained unable freely to alienate their lands.

The Indian Trade and Intercourse Act of 1834, 4 Stat. 729, 25 USC 177, (hereinafter "Non-Intercourse Act") had been passed to protect Indian land titles and to restrict purchase of Indian lands. By the Act of February 27, 1851, ch. 14, 9 Stat. 587, the Non-Intercourse Act was extended to all New Mexico Indians. *Pueblo of Santa Ana, supra*; *United States v. University of New Mexico*, 731 F.2d 703 (10th Cir. 1984); *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1975), *reh. denied* (1976). The Territorial courts of New Mexico chose to treat the Pueblo Indians differently from other Indians (*U.S. v. Lucero*, 1 NM 422 (1869)), and the Supreme Court in *U.S. v. Joseph*, 94 U.S. 614 (1876), acquiesced. But Congress consistently legislated to the contrary, subjecting Pueblo lands to Federal control and taking them out of state jurisdiction. *See e.g.*, Appropriations Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069; New Mexico Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, 558, 560. Upon the admission of New Mexico into the Union, the New Mexico Enabling Act in particular made it clear that the Pueblos were "Indians," and that their lands were "Indian country." That Act was sustained by the Supreme Court in *U.S. v. Sandoval*, 231 U.S. 28 (1913).

For the short period of confusion between the decision in *Joseph* and the contrary Federal enactments in 1905 and 1910, the Pueblo Indians were treated by many in New Mexico like other landowners with fee title to their land. For three hundred years prior to 1869, however, and since 1905, the Pueblo Indians did not have that unrestricted freedom and were prevented from conveying their land without governmental supervision.

The Pueblo Lands Act, passed to settle the confusion over the status of Pueblo land and to quiet title, reaffirmed the Non-Intercourse Act as applied to Pueblos, requiring Federal guidance and approval for Pueblo conveyances to be valid. This position was judicially sanctioned in *Candelaria*. With the exception of a short, isolated period, then, the Pueblo Indians have been unable to alienate their tribal land without governmental supervision since the arrival of and conquest by the Spanish in the mid-1550's.

B. Section 17 parallels the Non-Intercourse Act in prohibiting alienation of tribal lands without Congressional action.

Although the history behind the inclusion of Section 17 in the Pueblo Lands Act is meager, it does appear that this section was intended to cover the same grounds as the Non-Intercourse Act, though modified to apply to the unique situation of the Pueblo Indians. The Non-Intercourse Act was originally passed in 1834, a time during which the United States was still signing treaties with various Indian nations. By the time the Pueblo Lands Act had been passed, the Pueblo Indians were treated as wards of the Federal government and not as independent sovereigns who could make treaties. They had patents and titles to their lands. Disposal of the lands of a politically dependent entity would occur not pursuant to treaty but pursuant to a Congressionally mandated scheme. For this reason, the second part of Section 17 varies in its wording from the Non-Intercourse Act itself. The parallel remains obvious: land conveyances by Indians were restricted.

Section 17 is altered slightly from the Non-Intercourse Act to apply to the unique status of the Pueblo Indians. Congress perceived that the Pueblos were different from other tribes. They owned their land in fee; their status for twenty-nine years had been completely different from that

of other Indian tribes in that the Pueblos freely had land taken from them; and the United States never entered into any treaties with the Pueblos—treaties being the validifying document for conveyances made pursuant to the Non-Intercourse Act.

At the time the Non-Intercourse Act was enacted, Indian nations were independent sovereigns, not subject to condemnation statutes or the like. But “/t/here is as great need for such protection of the Pueblos of New Mexico, with respect to their lands acquired by purchase, as there is to lands otherwise acquired.” *Alonzo v. United States*, 249 F.2d 189, 196 (10th Cir. 1957), *cert. denied* 355 U.S. 940 (1958). All tribal conveyances at that time were voluntary and made through a treaty, and the Secretary of Interior was unable singlehandedly to initiate or approve treaties with independent sovereign nations. The Act of March 3, 1873, ch. 120, 16 Stat. 566, 25 USC 71, prohibited the making of treaties with Indian tribes, which were no longer recognized as independent nations.

By the time the Pueblo Lands Act was passed, the Pueblo tribes had lost physical possession of much of their land through condemnation, through adverse possession, through judgment liens and tax sales, through voluntary conveyances, and the like. The Pueblo Lands Act attempted to put an end to this, providing first that no future interests in Pueblo lands would be acquired in any way unless and until Congress passed a law permitting it,² and providing that Secretarial approval would be a prerequisite for all voluntary conveyances, just as for the other tribes.

The ninety years between the passage of the Non-Intercourse Act and the Pueblo Lands Act were ninety years of

²This stricture was included partially to underscore the sentiment of the time that the Act of March 2, 1899, ch. 374, 30 Stat. 990, 25 USC 311-18, did not apply to the Pueblos—thereby highlighting the need for legislation which would specifically include them.

intense development and change in the Federal-tribal relationship. That a treaty was required for the voluntary sale of Indian land in 1834 and that Secretarial approval was required for the voluntary conveyance of Pueblo lands in 1924 does not negate the effect, impact, and meaning of Section 17, which deals with both voluntary and involuntary conveyances. The difference in the wording of the Non-Intercourse Act and the Pueblo Lands Act is easily understandable in light of the history of Indian tribes in this country, and the close parallel in wording of the two Acts illustrates the Congressional intention in 1924 to extend the restrictions of the Non-Intercourse Act to the Pueblos.³

C. The two clauses of Section 17 are conjunctive, complementary, and clear.

The first clause in Section 17 expressly prohibits the acquisition of any right, title, or interest to Pueblo lands in any way except as Congress may provide at some time after the enactment of the Pueblo Lands Act and includes all conveyances, whether done under the auspices of New Mexico law or otherwise⁴. There is no limitation as to whether

³The statutes cited by Petitioner (Petitioner's Brief in Chief, page 30 n.23) as authorizing alienation of Indian land all require Secretarial consent when dealing with Indian lands from 1873 on. All such statutes are codified, and alienation occurs pursuant to those guidelines found in the Code of Federal Regulations. *See e.g.*, 25 CFR Subchapters H and I. Treaties entered into prior to 1873 generally required the consent of the President of the United States and are not regulated. The difference in the nature of treaties and statutes accounts for the difference in their requirements.

⁴Section 17 expressly referred to the laws of the State of Mexico, whatever they might have been, in prohibiting the acquisition of title to Pueblo lands, but conveyancing “in any manner,” involuntary or otherwise, was proscribed. The reference was not limited to condemnation laws but included New Mexico tax laws, judgment lien laws, property laws, case law, and any other law which provided or implied that Pueblo Indians were not Indians and could alienate their lands.

such acquisition be the result of voluntary or involuntary acts of the Pueblos, and the words "in any other manner" should be read to mean "in any other manner" and should not arbitrarily be limited, especially when to do so strains logic and the language. The second clause deals with conveyances made by the Pueblos themselves.⁵ Such conveyances, however they are characterized, are invalid without approval by the Secretary of Interior.

The sentence making up Section 17, read as a whole, would prohibit anyone from gaining right, title, or interest in and to Pueblo lands in any way whatsoever, without the instruction of future Congressional acts; even if a Pueblo itself were willing to convey such right, title, or interest, pursuant to such a Congressional act, Secretarial approval would be required. This reading of the sentence is not strained, and it complies with the general history and purposes of the Act, as more fully described hereinbefore and in the other briefs.

The proper way to construe a statute is to look at the language itself. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). The language of Section 17 is clear and unambiguous. Even were it not, statutes passed for the benefit of Indians are to be liberally construed, with doubt being resolved in their favor. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Northern Cheyenne Tribe v. Hollowbreath*, 425 U.S. 649, 655 n.7 (1976); *U.S. v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 354 (1941), *reh. denied* (1942). This canon of construction is to be applied in conjunction with the policies which require our courts to attend to the clear words and intent of Congress. *Rice v. Rehner*, —

⁵As such, they are presumed to be voluntary; however, even involuntary conveyances, if made by any Pueblo, would come under the constraints of this clause.

U.S. —, 103 S.Ct. 3291, 3302 (1983); *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975).

Congress has expressed itself clearly in Section 17. It truly would be unreasonable to attempt to imply Congressional intent when the intent is well expressed, particularly when the resultant implication would mean that, though Congress clearly offered protection to other tribes, it withheld such protection from the Pueblos, abjuring its own control in favor of the ambiguous, unrestricted authority of the Secretary of Interior and his various agents.

D. Section 17 does not make Secretarial approval the only prerequisite to a valid conveyance of Pueblo land, nor does Section 17 authorize the Secretary to approve such conveyances.

Section 17 provides that no sale of Pueblo land shall be valid without Secretarial approval, but the requirement of Secretarial approval is not the only prerequisite to a valid conveyance of Pueblo land. Such a reading violates a primary principle of logic: that the expression of one does not necessitate the exclusion of others. Prior Secretarial approval of a conveyance, while required, does not in and of itself validate any conveyance of land by Pueblo Indians, pursuant to Section 17, and there is no implication to the contrary in the statute itself.⁶

Section 17 is merely a one-sentence statement of Congressional policy. It contains no express authorization of power; no procedures, requirements, or regulations to implement it; and no guidelines to the Secretary as to the

⁶For example, a conveyance of lands by the Pueblos, to which the Pueblos did not have title, would not be valid, even though first approved by the Secretary of Interior. Neither would the conveyance of land by Pueblo Indians, approved by the Secretary, if such conveyance were done for illegal purposes. Obviously, Secretarial approval, while required, cannot by itself validate Pueblo conveyances, as Petitioner suggests.

nature, manner, scope, extent, requirements, timing, or boundaries of his approval. Section 17 is not limited to any designated purposes or land uses, does not specify procedures for the alienating of Pueblo land, and does not require or even authorize the promulgation of Federal regulations. Theoretically, according to Petitioner's analysis of Section 17, if the Secretary of Interior or one of his many agents were to indicate in any way, including orally, that he personally approved of conveyancing of Pueblo land, that would legitimize and constitute approval for any future sale, lease, or permit of Pueblo land without further ado. Common sense dictates that Congress would require more than mere oral approval by the Secretary or one of his agents to validate the disposal of tribal lands.

It is clear that, even contemporaneously, the need for something other than mere undefined Secretarial approval was clear. George A.H. Fraser, Special Assistant to the Attorney General of the United States, charged with representing the Government before the Pueblo Lands Board, in a letter dated February 27, 1926, to the Attorney General of the United States, specifically acknowledged the problem:

... Section 17 does not expressly say that Pueblo conveyances shall hereafter be valid if approved by the Secretary, but merely that they shall not be valid unless so approved. Theoretically, and in fact, the Pueblo Indians are incompetent to manage their own affairs, and I think it is unfortunate if the Pueblo corporations—and still more the individual Indians—are now authorized to convey, even subject to an approval, which must usually be based on the recommendation of some local official who may or may not be fully informed and disinterested. (Appendix 1 to Petitioner's Brief in Chief, p. 4a).

Procedures were necessary for the Pueblo Indians to make their conveyances and for the Secretary of Interior to approve them, and the legislative history shows that future

conveyancing was intended to occur "under strict supervision of the Department /of Interior/."⁷ All other aspects of tribal life are controlled by Federal laws and regulated by Federal regulations, from the education of Indians, financing economic developments of Indians, Indian health care, Indian child welfare, development of tribal mineral resources, and the like. *See generally* U.S. Code, Title 25. It is specious to think that alienation of the entire land base of every Pueblo Indian in the State of New Mexico could occur without adherence to any Federal guidelines or regulations at all.

Equally important, nowhere in Section 17 is the Secretary authorized to approve Pueblo conveyances. *See Southern Pacific Transp. Co. v. Watt*, 700 F.2d 550 (9th Cir. 1983). Such authorization is simple enough to express, had Congress intended to do so. Currently, the statutes governing rights-of-way through Indian land have been codified at 25 USC Section 311, *et seq.* It is worth noting that, for each type of right-of-way involved, the Secretary of Interior is expressly authorized and empowered to grant the relevant rights-of-way.⁸ A conspicuous lack of

⁷See Commissioner Burke's statements, *Pueblo Indian Lands: Hearing on S. 3865 and S. 4223 Before a Subcomm. of the Senate Comm. on Public Lands and Surveys*, 67th Cong., 4th Sess. 155 (1923).

⁸Section 311: "The Secretary of Interior is authorized to grant permission" for public highways. Section 319: "The Secretary of Interior is authorized and empowered to grant a right-of-way . . . for the construction, operation, and maintenance of telephone and telegraph lines . . ." Section 320: The Secretary "is authorized to grant" lands for reservoirs, material or ballast pits. Section 321: "The Secretary of Interior is authorized and empowered to grant a right-of-way for oil and gas pipelines." Other statutes are equally explicit. *See also* 25 U.S.C. Sections 323, 396a-396g, 399, 400, 400a, 402-402a, 403a, 403b-403c, 407, 415, 416-416j, and 641-646.

such delegation of power to the Secretary characterizes Section 17.⁹

Congress knows how to express its intent. *Bryan*, 426 U.S. at 389-90; *Southern Pacific Transp. Co.*, 700 F.2d at 554. If Congress had wished to provide a Federal means of alienating Indian lands, it could have done so, undoubtedly in a manner similar to that in which it had previously enacted the Act of March 2, 1899, ch. 374, 30 Stat. 990-92, 25 USC 311-18, and the Act of March 3, 1901, ch. 832, 31 Stat. 1083-84, 25 USC 311, 319, and in which it subsequently enacted the Act of April 21, 1928, ch. 400, 45 Stat. 442, 25 USC 322, and the Act of February 5, 1948, ch. 45, 62 Stat. 17-18, 25 U.S.C 323-28. These Acts, both prior and subsequent to the Pueblo Lands Act, dealt with the alienation of Indian land, and none of them purported to do so by merely alluding to the requirement of prior approval by the Secretary of Interior.

More reasonably, Section 17 contemplates a future Congressional enactment which would provide the means by which right, title, and interest in and to Pueblo lands could be acquired, both voluntarily and otherwise, and, further, which would authorize the Secretary of Interior to approve conveyances occurring pursuant to the terms of the second part of Section 17. Such Congressional action was, in fact,

⁹Petitioner argues that, as sovereigns, the Pueblo tribes have reserved rights and did not need to be delegated power by Congress to convey their lands. This is true, but, to the extent that the issue concerns the extinction of title to lands held by tribes as dependent, not independent, sovereigns, Federal law is inevitably involved. See *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 670 (1974); *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 626 (2nd Cir. 1981), cert. denied, 452 U.S. 968 (1981). Section 17 operated as an exertion of Federal control over Pueblo land, making it clear that, notwithstanding earlier Federal or State enactments or decisions, all future interests in and to Pueblo land would have to be acquired pursuant to a future Congressional enactment.

forthcoming and currently exists, but it did not exist in 1924.

E. Section 17 required additional Congressional action for the acquisition of any right, title, or interest in and to Pueblo land.

Section 17 clearly contemplates future Congressional action *prior* to the acquisition of any right, title, or interest to Pueblo lands. If a legislative body wished to prevent the passage of title to land, by whatever means, until future laws and regulations were developed, it could not do so in any clearer manner than to provide that "no right, title, or interest in and to the land . . . shall hereafter be acquired or initiated . . . in any other manner except as may hereafter be provided"

In 1925, George A.H. Fraser was of the opinion that Section 17 operated as a bar to conveyances of Pueblo land, not as authority for them. It was his understanding not only that existing Federal acts failed to provide justification for grants of rights-of-way, but also that the New Mexico Enabling Act required the express approval of Congress for *any* conveyances of Pueblo land. See Appendix 1, p. 4; Appendix 2, pp. 2-4; Appendix 1 to Petitioner's Brief in Chief, p. 51, paragraph 4. Fraser's original analysis was that Section 17 required future Congressional action prior to the conveyancing of any interest in Pueblo lands. This later re-evaluation was the result of Fraser's practical desire to legitimize the existing illegitimate rights-of-way of the politically-powerful.¹⁰

¹⁰In a letter of November 4, 1925, to the Attorney General in Washington, D.C., George A. H. Fraser noted that "b/y the weight of authority, ejectment will lie against a railway which has come on a man's land as a trespasser, but as a practical matter it is impossible to get rid of a Railway once in operation, and a court would go far to defeat such action in a case like this, where development of the State is promoted and influential local interests are involved." Appendix 1, p. 4; see also Appendix 2, p. 4.

Section 17 did not provide the authority for either voluntary or involuntary conveyancing but left that to future congresses. By the Act of May 10, 1926, ch. 282, 44 Stat. 498, Congress passed the Federal condemnation legislation providing for involuntary alienations of Pueblo land. This Act was repealed by implication in 1928, and the resultant right-of-way bill, the Act of April 21, 1928, ch. 400, 45 Stat. 442, 25 U.S.C. 322-322a, thereby extended the provisions of the earlier right-of-way acts to the Pueblos. By the Act of February 5, 1948, ch. 45, 62 Stat. 17-18, 25 USC 323-28, consensual right-of-way provisions were added. Today, the land of both Pueblos and other Indians may be alienated, both voluntarily and involuntarily, pursuant to Congressional enactments subsequent to and as contemplated by Section 17.

F. The administrative interpretation contradicts both the language and purpose of the Pueblo Lands Act and is a violation of the trust responsibility of the United States.

Although a history of administrative interpretation may be considered by a court in deciding the meaning of a statute, such administrative interpretation is not controlling. *Zuber v. Allen*, 396 U.S. 168, 192 (1969). In particular, if that interpretation is incorrect, either in its construction or in its frustration of Congressional policy, it should be ignored. *S.E.C. v. Sloan*, 436 U.S. 103, 117-18 (1978); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973); *Plateau, Inc. v. Department of Interior*, 603 F.2d 161, 164 (10th Cir. 1979). A history of improper or incorrect administrative action is not precedent and does not obligate the Supreme Court of the United States to condone such practices. The fact that the Federal Government consistently disclaimed its fiduciary duty and failed to protect the Pueblos—a fact which, ironically, is now offered

to show its longstanding contemporaneous administrative interpretation of Section 17—does not mean the fiduciary obligation does not exist, and does not mean that Pueblo land alienation can occur without compliance with Federal law. See *Mohegan Tribe*, 638 F.2d at 623.

This case presents one of the starkest examples in Indian law history of the Federal Government's treacherous conflict of interest. Although obligated to safeguard Indian lands, the Federal Government has treated its obligations as fictitious, seeking, through administrative channels, to expedite the improper alienation of Pueblo lands, not only for third parties but also for the benefit of itself. Its sanction of the use of Section 17 to validate existing invalid rights-of-way and to grant new rights-of-way was an unforgivable abuse of its fiduciary role. This betrayal of its trust responsibility was recognized by the Government when, in 1982, it filed Section 17 lawsuits on behalf of various Pueblos.¹¹ The very Government currently involved with the resolution of those suits and charged with zealous advocacy on behalf of its charges, is, in the instant case, advocating the opposite view! This on-again, off-again trust obligation and the attendant conflicts of interest have resulted in a pattern of double-dealing and faithless advocacy.

Traditionally, the Federal Government is held to the standards of a fiduciary in administering Indian affairs. *Seminole Nation v. United States*, 316 U.S. 286 (1942). The

¹¹E.g., *United States of America on behalf of the Pueblos of Santa Clara and San Ildefonso, Plaintiffs, v. Jemez Mountain Electric Coop. Defendant*, No. CIV-82-1482M; *United States of America on behalf of the Pueblos of Acoma, Isleta, Jemez, Laguna, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Clara, Santo Domingo, Tesuque, Taos, and Zia, Plaintiffs, v. Mountain States Telephone and Telegraph Co., Inc., and Continental Telephone Company of the West, Defendants*, No. CIV-82-1513C.

Federal obligation was specifically described by the Non-Intercourse Act, which extended the trust relationship to protect the lands of all federally-recognized tribes. See *Morrison v. Work*, 266 U.S. 481 (1924). The Pueblo Lands Act itself characterized the United States as acting "in its sovereign capacity of guardian of said Pueblo Indians." Section 1, Pueblo Lands Act. As the trustee, the Federal Government has certain unique obligations to the tribes and is required to act in good faith and to use reasonable skill and care in exercising its powers as trustee. *Seminole Nation, supra*; *U.S. v. Kagama*, 118 U.S. 375 (1886); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). The duty to protect tribal property is even greater when the Federal Government itself is involved in transactions with the tribes. See *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct.Cl. 1966).

It is clear that, at the time of the Pueblo Lands Act, several entities, including Petitioner, were in trespass on tribal lands and needed a means of validating their existing rights-of-way. No Federal statutes permitting the grant of rights-of-way existed. Section 17 was the only existing statute which could even be stretched to pretend to allow voluntary conveyances of Pueblo land. And so, without further Congressional authorization or action, as required specifically by Section 17, the Federal Government, acting through an agent of the Secretary of Interior, approved the illegal transfers of land.

The Federal Government was well aware that Secretarial approval alone was insufficient to validate Pueblo conveyances, but it failed to step in for the protection of the Pueblos. In the instance of the railway at Jemez, for example, the fact that the railway company had already trespassed, had constructed its lines, and was "impossible to get rid of" was sufficient to cause Federal acquiescence rather

than Federal adherence to Section 17.¹² Such nonchalance and lack of concern about its wards is by itself a gross breach of duty, but the treason was further compounded when, in the 1950's, the Secretary of Interior again utilized Section 17 to the Government's benefit in conveying interest in Pueblo lands to the Bureau of Reclamation.¹³ These rights-of-way were granted pursuant to Section 17, despite the fact that alternative valid laws existed, providing exclusive procedures by which interest in the lands of Pueblos may be acquired.¹⁴

G. Section 17 is not limited to rights-of-way.

The Pueblo Lands Act, Section 17, is not limited to rights-of-way. It specifically refers to "sale, grant, lease of any character, or other conveyance of lands" as the acts which require prior Secretarial approval. The United States would have its cake and eat it too, claiming that Secretarial approval can validate Section 17 rights-of-way but cannot validate any other conveyance. This position is unsupportable

¹²See generally Appendices 1 and 2 hereto and Appendix 1 to Petitioner's Brief in Chief.

¹³See *Pueblo of Isleta, Plaintiff, v. James Watt, Secretary of Interior; Garrey Carruthers, Assistant Secretary of Interior—Land and Water Resources; Robert N. Broadbent, Commissioner of the Bureau of Reclamation; U.S. Department of Interior; Middle Rio Grande Conservancy District, Defendants*, CIV-82-1504C; and *Pueblo of Sandia, Plaintiff, v. James Watt, Secretary of Interior; Garrey Carruthers, Assistant Secretary of Interior—Land and Water Resources; Robert N. Broadbent, Commissioner of the Bureau of Reclamation; U.S. Department of Interior; Middle Rio Grande Conservancy District, Defendants*, CIV-82-1536M.

¹⁴Act of May 10, 1926, 44 Stat. 498 (repealed by the 1928 Act); Act of April 21, 1928, ch. 400, 45 Stat. 442, 25 USC 322; Act of February 5, 1948, ch. 45, 62 Stat. 17-18, 25 USC 323-28. All of these acts were codified and regulations promulgated thereunder to ensure protection of the tribal lands.

by the statutory language or by logic, and is only understood when one recognizes the contradictory position into which the United States has gotten itself by its two-faced advocacy.

The United States, as a fiduciary obligated to protect tribal lands, cannot in any way justify the sale of Pueblo lands with only the undefined and unregulated Secretarial approval as a prerequisite. But, because the United States benefited itself with Section 17 rights-of-way, and because the United States has actively acquiesced in the grant of Section 17 rights-of-way to others, it now argues to this Court that Section 17 permits the grant of *rights-of-way* with Secretarial approval, but does not permit any other sort of conveyance, Secretarial approval notwithstanding. Such a self-serving, shameful position inevitably results when a synthetic protector and fiduciary deals for its own benefit to the detriment of its wards. Either all sales, grants, leases, and conveyances of lands by Pueblos are valid if approved by the Secretary of Interior, or no sale, grant, lease, or conveyance of lands by Pueblos is valid, even with such approval. There is no middle ground and no exception for rights-of-way.

CONCLUSION

Petitioner would have this Court resurrect the anomalous period existing at the turn of the century when Pueblo Indians were not considered by many to be Indians or to be entitled to Federal protection. Seventy years ago, in *Sandoval*, this Court recognized the error of such thinking and righted the course of the law. Congress did so as well by passing the Pueblo Lands Act requiring Pueblo Indians to be treated as other Indians. The proper construction and application of Section 17 are clear, and the rulings of the trial court and of the Federal appellate court should be sus-

tained. *Amici curiae* respectfully request that this Court hold that Section 17 did and does not permit New Mexico Pueblos to alienate or convey interests in their lands without statutorily-designated Federal supervision.

Respectfully submitted,

L. Lamar Parrish
Catherine Baker Stetson
USSERY & PARRISH, P.A.
P. O. Box 487
Albuquerque, New Mexico 87103
(505) 247-0145
Attorneys for Amici Curiae

APPENDIX

APPENDIX 1

DEPARTMENT OF JUSTICE
Washington, D.C.

Santa Fe, N.M.
Nov. 4, 1925.

BMP No. 210663

Department of Justice File 210663-135
Record Group 60 (Section 3)

PUEBLO LANDS BOARD

The Attorney General,
Washington, D.C.

Sir:

As a matter of information and record, I wish to follow up my last letter (undated, but written about October 30th) on the question of suits to quiet title and other matters arising under the Pueblo Lands Act of June 7, 1924. Also, you may wish to approve or disapprove my tentative views on the proper course to pursue.

1. As stated in that letter, I fear that, even if the objection of multifariousness is overruled, the suit to quiet title may be dismissed against any defendants who prove that they are in possession and raise the objection that a suit in equity deprives them of their constitutional right to a jury trial. If so, there will be tracts the Indian titles to which have been held by the Board to be unextinguished and of which defendants yet retain possession. If such cases occur, I judge that it will be the duty of the United States under its general power of guardianship,

apart from the Act, to bring separate suits in ejectment against such defendants.

Since the Act is mandatory in the matter of a suit to quiet title, I assume that that course must be tried first, whatever we may think as to its soundness.

In the case of Tesuque, it is possible that no defendants will raise the constitutional question, in spite of their announced intention to do so; but in the long run, it is hardly conceivable that this point will not be raised somewhere at some time.

2. I find that under local State practice, in suits to quiet title, it is universal to add to the defendants named "all unknown persons claiming any interest or title adverse to the plaintiff." This is authorized by early acts and by an amendatory act of 1925. Service is then had by publication. I am unable to find any Federal statute or rule authorizing the inclusion of unknown persons as defendants, although there is a familiar statute providing for service by publication on defendants not found. While of course a State act cannot enlarge Federal equity jurisdiction, yet various Supreme Court cases say that a Federal Court may, if it please, enforce a right created by State law. Service by publication in English and Spanish for the statutory six weeks would probably cost about \$100.00. It is possible that there are persons not in possession and who have placed no deeds on record who yet have deeds from a Pueblo or some Mexican living thereon which might later form the basis of a claim. A very large number of the earlier deeds presented to the Board as color of title have never been recorded.

The question then is whether it is worth while to make "unknown persons" defendants and to incur the expense of service by publication, in view of the uncertainty whether this will do any good. Considering that this is the regular practice in New Mexico and that it apparently effects a completeness otherwise wanting, I am inclined to follow it. Please give me your instructions as to this.

3. This same difficulty becomes acute in the case of the Pueblo of Jemez, where only three non-Indian claims were presented. I do not know how the Board will decide them, but having listened to the evidence would expect it to uphold them. If so, there would be no known claimants at all to the Indian lands title to which the Board finds unextinguished, and if the suit to quiet title is brought, the only possible defendants would be "unknown defendants. Yet, under the provisions of the Act, the suit is mandatory.

If this turns out to be the situation, I would be inclined to bring the suits against "unknown defendants" for what it may be worth.

4. But Jemez will probably produce still another complication. On July 11, 1924, the Secretary of the Interior approved an application of the Santa Fe & Northwestern Railway Company for a right-of-way across the Jemez Pueblo lands, a distance of about 14 miles (incidentally, a similar right-of-way was approved across two other Pueblo grants, - Zia and Santa Ana). This was in pursuance of surveys and negotiations beginning about July, 1921. The Indians were very loath to permit the railway to cross their grant, but were finally persuaded or gently forced to do so. No court proceedings were had. An informal appraisal of damages was made by H.F. Robinson, Supervising Engineer, Indian Irrigation Service, Albuquerque, F.C.H. Livingston, then Special Attorney for the Pueblo Indians, Belen, and Louis R. McDonald, Agency Farmer, Jemez Pueblo, aggregating 2,946.55. This amount was apportioned and distributed among the individual Indians whose lands were taken, or damaged, although part went to the Pueblo as an entity. The money was accepted, although apparently with some demur. Mr. Robinson, who is an experienced and conscientious man, assures me that the damages awarded were adequate. The whole matter was engineered by H.P. Marble, Superintendent of the Southern Pueblos, Albuquerque, who recommended approval to the Commissioner of Indian Affairs, who, in turn, recommended it to the Secretary. The railway was originally a private carrier—a logging railway—

but has recently been recognized as a common carrier by the Interstate Commerce Commission. It was constructed across the Pueblo during 1923 and 1924; probably had trains running in 1924, and is still in operation.

The Act by which it is attempted to justify all this is that of March 2, 1899, 30 Stat. L. 990, as amended June 25, 1910, 36 Stat. 859, Compiled Statutes, Sec. 4181. This authorizes, under certain conditions,

"A right-of-way for a railway, telegraph, and telephone line through any Indian Reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian Agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation."

The only possible portion of the above which could authorize the allowance of this right-of-way is the expression "through any lands held by an Indian tribe or nation in Indian Territory." But Sections 22 and 23 of an Act of Feb. 28, 1902, 32 Stat. 50, repealing the above Act insofar as it applies to Indian Territory and Oklahoma, make clear to my mind that the expression "Indian Territory" means the territory now embraced in the state of Oklahoma and not Indian territory in general. The statute relied on, therefore, seems to me to furnish no justification for the grant or approval of this right-of-way over lands owned in fee by the Pueblo. This view is emphasized by Section 17 of the Pueblo Lands Act of June 7, 1924, reading in part:

"No right, title or interest, in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined, shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress."

This was passed prior to the Secretary's approval. If the foregoing is correct, the railway is a trespasser, and indeed could only have acquired a right-of-way by special act of Congress in view of Section 2, paragraph 2, of the New Mexico Enabling Act, whereby the Pueblo lands are declared to be "subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

The Railway Company did not present its claim to the Board, which informally advises me that it intends to return the land over which the railway passes, as Indian land the title to which has not been extinguished.

The question will then be squarely presented as to what course we must take. Section 3 of the Pueblo Lands Act requires a suit to quiet title to all Indian lands so returned, but as above stated, the only known defendant so far will probably be this Railway Company, which is unmistakably in possession, so that a suit to quiet title will not lie. By the weight of authority, ejectment will lie against a railway which has come on a man's land as a trespasser, but as a practical matter it is impossible to get rid of a Railway once in operation, and a court would go far to defeat such action in a case like this, where development of the State is promoted and influential local interests are involved.

An action in trespass for damages will also lie, and in this case the amounts actually paid the Indians could be counterclaimed. If they were adequate, plaintiff would have no recovery.

Although satisfied that the Appraisers acted in good faith and believed the award to be adequate, I doubt if it is really so for this reason: In the way these people live, two or three acres will support a family all their lives. An award of \$300 or \$450 producing a theoretical income of \$18.00 or \$27.00 a year, is obviously a totaliy inadequate equivalent.

After much reflection, I recommend two proceedings in Jemez, in case the situation develops as hereinabove indicated.

- (a) A suit to quiet title against all unknown defendants.
- (b) An action in trespass against the Railway Company, in which we may hope to recover some additional damages.

While one is reluctant to criticize the course of the Department of the Interior, it seems to me that if the land over which the Railway runs is returned by the Board as Indian land with unextinguished title, the Lands Board Act leaves no alternative but to sue. This is especially appropriate where the Department has acted without any opinion from the Attorney General and apparently without authority of law.

5. There will be still another difficulty at Jemez. On September 28, 1878, an agreement was made between the Governor and Principals of Jemez and B.M. Thomas, then Indian Agent, reading as follows:

"It is hereby agreed by and between the Pueblo of Jemez, represented by the Governor and officers and principals thereof, on the one part; and B.M. Thomas, U.S. Indian Agent on the other part, that a certain piece of land situated at the northeast side of the Pueblo of Jemez, extending from the house now being built thereupon, for Mission and School purposes, distances and directions herein described, viz: To the north seventy-five yards; to the east thirty-five yards; to the south seven yards; to the west ten yards; be and hereby is devoted to school purposes for the benefit of said Pueblo, so long as the parties building the house shall maintain a school upon said premises for the benefit of said Pueblo.

"In testimony whereof we, the parties of both parts, hereby sign our names at the Pueblo of Jemez this twenty-eight day of September, one thousand eight hundred and seventy-eight."

(Signed by the Governor and 12 other officials and Ben M. Thomas, U.S. Indian Agent.)

Although no mention is made of the real party in interest, this agreement was for the use of the Presbyterian Mission, which proceeded to construct a building on the premises described. I am told that it might cost \$1500 or \$2000 at present prices to reproduce it.

This agreement is not a lease and may probably be classified as a license to occupy the land. The Mission presented no claim to the Board, which therefore took no official cognizance of the situation and will probably return the land in question as Indian land the title to which is not extinguished. Since the Act requires suit to quiet title to such land, at first glance it would appear that the Mission should be made a defendant; but it is obviously in possession and therefore a suit to quiet title is not appropriate, at least if objection on that ground is made. Further, insofar as the above agreement has any legal effect, it shows that the Mission's possession is not adverse, for which reason also a suit to quiet title is inappropriate.

Probably the Mission is technically maintaining a school, as the agreement provides, since it has the building with a person ready and willing to teach. In fact, however, there is not a single pupil in attendance, nor has there been for a long time back, and the Indians, or some of them, would like to have the land, and more especially the building.

After attempting to balance the scales, my opinion is that the Mission should not be made a party to the suit to quiet title, nor otherwise sued, because its possession is not adverse. If the Indians are dissatisfied with the situation, they should first give notice to the Mission of the termination of the license, and then proceed, independently, or ask their official attorney, to proceed to recover possession in any appropriate way. If you disagree with the foregoing, please inform me.

6. You are aware from this and previous letters that the Lands Board Act is a well meaning but ill constructed measure which develops difficulties at every step. Mr. Jennings intends to submit to you before long an amendment to Section 2, designed to clarify the financial situation, and naturally the desirability

of amending the Act in various other particulars has been under discussion. There seems to be much hesitation, however, in suggesting any change to Congress because the difficulty of procuring the passage of the Act in its present shape was so great that there is fear lest it be emasculated if the attention of Congress is again directed to it.

So far as the suit to quiet title goes, it is doubtless desirable to try out the working of this requirement before suggesting any change. There is, however, one matter which seems to me of immediate importance. The valuation report required by Section 6 is given the effect of a judicial finding and final judgment. The primary report required by Section 2, which separates the Indian from the non-Indian lands, is not expressly given any weight whatever, although it is the most important of the four reports provided for. So far as the Act shows, its only effect is to describe the Indian land which is to be the subject of the suit to quiet title and in a way to designate the defendants in such suit, or some of them. I think at least that this report should be prima facie evidence in the suit of the matters and things therein decided, and I also think that it should be permissible to introduce in the suit the evidence taken before the Board, or any part of it, subject, of course, to be rebutted or supplemented by other evidence. If you agree with me in this, I will be glad to submit a draft of a proposed amendment to Section 3 along these lines.

Respectfully,

Special Assistant to the
Attorney General

GAHF-S

APPENDIX 2

SANTA FE, NEW MEXICO,
February 24, 1926.

E.W. Dobson, Attorney at Law,
P.O. Box 650,
Albuquerque, N.M.

U.S. ex rel. Pueblo of Jemez vs. Santa Fe
& Northwestern Railway Company.

Dear Mr. Dobson:

Pursuant to our telephone talk yesterday, I write to set forth my position and theory as to this case.

1. The Pueblo Lands Board, in its report on Jemez Pueblo, filed in the U.S. District Court November 24, 1925, and headed "Title to Lands Granted or Confirmed to Pueblo Indians not Extinguished," says the following regarding this railroad:

"The Board further finds that the lands, the title to which has not been extinguished, are burdened with what is known as the

SANTA FE & NORTHWESTERN RAILROAD

The constructed line of this road crosses the entire Pueblo from north to south, following the bed of the Jemez River, and occupies a location in some places fifty feet, in others one hundred feet in width.

The Indian title in the lands embraced in this location has not been extinguished, but such lands are subject to whatever servitude or burden may be constituted by the construction and operation of this railroad and the right of way granted to the Santa Fe & Northwestern Railway Company by the Department, July 11, 1924, under the act of March 2, 1899, (30 Stat. L., 990)."

In view of this finding, Sections 1 and 3 of the Pueblo Lands Act of June 7, 1924, made imperative a suit to quiet title against the Railway Company. Section 1, you will observe, requires such suit to cover "any claims of any kind whatsoever adverse to the claim of said Pueblo Indians as hereinafter determined." The reason why the Railway Company is the only defendant is that there were only four other claims in Jemez adverse to the Pueblo title and all of these were upheld by the Board. Therefore, under the Act, they do not come within the scope of the suit to quiet title.

2. Of course no title by adverse possession has had time to accrue in favor of the Railway Company and its claim rests alone on the Act of March 2, 1899, 30 Stat. L. 990, as amended 36 Stat. 859; U.S. Compiled Stat. Sec. 4181, et seq. This authorizes under certain conditions, "a right of way***** through any Indian Reservation in any state or territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian Agency, or for other purposes in connection with the Indian Service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty but which have not been conveyed to the allottee with full power of alienation."

The only portion of the above which could possibly authorize the allowance of this right of way through Pueblo lands held in fee by the Indians and to which the United States has never had title, is the expression "through any lands held by an Indian tribe or nation in Indian Territory." The remainder of the Act, especially compiled Statutes 4183 and 4185, make it perfectly clear, however, that "Indian Territory" means the country included now within the State of Oklahoma; as also does the Act of February 27, 1902. 32 Stat. pp. 45-51, in part repealing the above Act. This being true, said Act furnishes no justification whatever for a grant of this right of way over Pueblo land.

This is emphasized by the familiar language of the New Mexico Enabling Act, to the effect that such lands "shall be and remain subject to the disposition and under the absolute juris-

diction and control of the Congress of the United States." This, I take to mean that thereafter, in view of the peculiar status of the Pueblos and their lands, no disposition of the same, or of any right therein, could be made without express approval of Congress.

All this is made absolutely certain by Section 17 of the Pueblo Lands Act of June 7, 1924, reading in part:

"No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may *hereafter* be provided by Congress."

This was passed before the Secretary of the Interior approved your right-of-way.

There are also some minor objections, e.g. Section 4161, *supra*, provides that "in case objection to the granting of such right of way shall be made, said Secretary shall afford the party so objecting a full opportunity to be heard." As you know, the Indians seriously objected to the granting of this right of way, but no opportunity whatever of hearing before the Secretary was granted.

Again, Section 4185 provides for the payment of an annual charge of not less than \$15.00 a mile on the mileage of the line through the Indian land, in addition to other compensation. I am not informed that this payment has been made.

These two things, however, are trivial as compared with the fundamental weakness first outlined.

Having made a full disclosure of my reasons for considering this grant invalid, I am sure you will reciprocate by similarly informing me of any reasons you may have for maintaining it.

3. Noting your desire for an early trial, in which I join, I assume that you will there produce your permit from the Secretary of the Interior, with my supporting documents.

Please inform me whether you will also admit the purpose of the Company to continue to maintain and operate its railroad if not prevented, and whether you will prove or state in open court, or stipulate, the date when the railroad was constructed? The proof, on either side, will, I imagine, be very slight, since the case will turn on the law rather than the facts.

4. The following is a statement of my personal and unofficial views as to this situation. I am informed that this railroad is a valuable public utility and should be favored rather than discouraged. If the case should be decided in plaintiffs' favor, I would not attempt to obtain a decree ousting the Company or hindering the operation of its road, but would ask merely for the quieting of the Pueblo title as against it, leaving it to seek protection by an Act of Congress which, in my judgment, is the only way in which it can obtain a legal right across the Pueblo. This is inevitable, in view of Section 17 of the Pueblo Lands Act above quoted. Please understand clearly that the foregoing represents merely my individual views, and does not in any way bind the Department of Justice.

Please let me hear from you within the next few days, addressing me as above at Santa Fe, and letting me know when you wish this case taken up, and giving me an outline of your defense, if any. I will be glad to meet your wishes in any way that I properly can.

Very truly yours,

Special Assistant to the
Attorney General.

CAHF-S

(14)
No. 84-262

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ALEXANDER L. STEVAS,
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,
Petitioner,

v.

PUEBLO OF SANTA ANA,
Respondent

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE
PUEBLO OF TAOS IN SUPPORT
OF PUEBLO OF SANTA ANA

WILLIAM C. SCHAAB
Rodey, Dickason, Sloan,
Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, NM 87103
Telephone: 505-765-5900

Attorney for the
Pueblo of Taos,
amicus curiae

January 7, 1985

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii-v
STATEMENT OF INTEREST	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
1. SECTION 17 OF THE 1924 ACT CANNOT REASONABLY BE CONSTRUED TO AUTHORIZE GRANTS OF PUEBLO LAND SUBJECT ONLY TO APPROVAL BY THE SECRETARY OF THE INTERIOR.	5
2. CONGRESS CONFIRMED RESPON- DENT'S CONSTRUCTION OF § 17 BY ENACTING SPECIFIC RIGHT- OF-WAY STATUTES FOR PUEBLO INDIAN LAND IN 1926 AND 1928.	21
3. PETITIONER'S CONSTRUCTION OF § 17 IS REPUGNANT TO THE 1926, 1928 and 1948 ACTS.	24
4. TAOS PUEBLO ENDORSES THE ADDITIONAL ARGUMENTS PRESENTED BY RESPONDENT AND THE OTHER <u>AMICI PUEBLOS</u> .	27
CONCLUSION	30

APPENDICES:

APPENDIX A:

October 31, 1984 Letter from
Solicitor Frank K. Richardson,
United States Department of
the Interior, to Hon. F. Henry
Habicht, Assistant Attorney
General, Department of Justice

CONSENT TO FILE TAOS PUEBLO'S
BRIEF AMICUS CURIAE

PROOF OF SERVICE

TABLE OF AUTHORITIES

CASES:	Page
<u>Alonzo v. U.S.,</u> 249 F.2d 189 (10th Cir. 1957)	7
<u>Cramer v. U.S.,</u> 261 U.S. 219 (1938)	29
<u>Garcia v. U.S.,</u> 43 F.2d 873 (10th Cir. 1930)	13
<u>New Mexico v. Aamodt,</u> 537 F.2d 1102 (10th Cir. 1976)	7
<u>Plains Electric G & T Coop.</u> <u>v. Pueblo of Laguna,</u> 542 F.2d 1375 (10th Cir. 1977)	7,22,23
<u>United States v. Algodones</u> <u>Land Co.,</u> 52 F.2d 359 (10th Cir. 1931)	7
<u>United States v. Brown,</u> No. 1814 Equity (D.N.M. 1927)	28
<u>United States v. Candelaria,</u> 271 U.S. 432 (1926)	7,9
<u>United States v. Chavez,</u> 290 U.S. 354 (1933)	7
<u>United States v. Herrera,</u> No. 1720 Equity (1928)	13
<u>United States v. Joseph,</u> 94 U.S. 614 (1876)	8

<u>United States v. Mountain States Tel. & Tel. Co., et al., No. 82-1513 (D.N.M.)</u>	2
<u>United States v. Rio Grande Dam and Irrigation Co., 174 U.S. 690 (1899)</u>	8
<u>United States v. Sandoval, 231 U.S. 28 (1913)</u>	7,9
<u>United States v. Woodford, No. 1630 Equity (D.N.M.)</u>	13
<u>United States v. Wooten, No. 1784 Eq., 40 F.2d 882 (10th Cir. 1930)</u>	4

STATUTES

Nonintercourse Act of 1834, 25 U.S.C. § 177	6
Act of February 27, 1851, ch. 14 § 7, 9 Stat. 25	6
Act of July 22, 1854, 10 Stat. 308	6
Act of December 22, 1858, 11 Stat. 374	6
Act of March 2, 1899, 25 U.S.C. §§ 312-314	26
Act of March 3, 1901, 25 U.S.C. § 318	26

New Mexico Enabling Act of June 20, 1910, 36 Stat. 557	6
Pueblo Lands Act of 1924, 43 Stat. 636	2,5,10
Act of May 10, 1926, 44 Stat. 498	4,24
Act of April 21, 1928, ch. 400, § 1, 45 Stat. 442, 25 U.S.C. § 322	4,24
Act of February 5, 1948, c. 45 § 1, 62 Stat 17, 25 U.S.C. § 323	5,24
25 U.S.C. §§ 311, 312-314, 319, 320, 321, 393-394, 396, 397, 399, 406-407	10
25 U.S.C. § 402	9
25 U.S.C. §§ 322, 328	25
REGULATIONS:	
25 C.F.R. § 169.1 <u>et seq.</u>	25
OTHER AUTHORITIES:	
Kelly, <u>John Collier and the Pueblo Lands Board Act,</u> 58 N.M. Hist Rev. 5 (1983)	28

No. 84-262

IN THE
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October Term, 1984

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY,

Petitioner,

v.

PUEBLO OF SANTA ANA,

Respondent

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF AMICUS CURIAE OF THE
PUEBLO OF TAOS IN SUPPORT
OF PUEBLO OF SANTA ANA

The Pueblo of Taos, New Mexico, files
this brief amicus curiae in support of
Respondent pursuant to Rule 36 of the Supreme
Court Rules.

STATEMENT OF INTEREST

The Pueblo of Taos has a direct interest in the Court's disposition of this proceeding. Petitioner owns and operates a telephone line installed on Taos Pueblo lands (the "\$ 17 Line"), the right-of-way for which was obtained under § 17 of the Pueblo Lands Act of 1924, 43 Stat. 636 (the "1924 Act"). On December 29, 1982, the United States sued the Petitioner on behalf of Taos Pueblo to obtain a judgment that such right-of-way was null and void, that Petitioner be ejected from Taos Pueblo lands and be required to pay damages for its unauthorized use of the Pueblo's lands. U.S. v. Mountain States Tel. & Tel. Co., et. al., No. 82-1513. The Pueblo is not a party to that suit, but it supports the position of the United States therein. The suit is held in suspense by order based on the agreement of the parties pending the

outcome of this appeal.

The § 17 Line was obtained by Petitioner for a recited consideration of \$48 under an instrument dated February 3, 1927, executed by representatives of the Pueblo, which purported to grant an easement on Pueblo lands for a telephone and telegraph "pole line" then in existence. The instrument does not contain a precise survey description of the land affected, the acreage covered by the purported easement, or the term of the rights granted. The instrument referred to an earlier, possibly defective instrument, which apparently purported to grant a similar right-of-way for a consideration of \$194.50. The instrument was approved by the Commissioner of Indian Affairs on March 8, 1927, and by the Assistant Secretary of the Interior on March 10, 1927, "in accordance with the provisions of section 17" of the

1924 Act.

Petitioner was named a defendant in U.S. v. Wooten, No. 1784 Eq. (40 F.2d 882, 10th Cir. 1930), the quiet title suit brought under § 3 of the 1924 Act with respect to Taos Pueblo lands. After approval of the right-of-way for the § 17 Line by the Secretary, the Wooten complaint against petitioner was dismissed pursuant to stipulation on November 18, 1927.

SUMMARY OF ARGUMENT

1. Section 17 of the 1924 Act cannot reasonably be construed to authorize grants of Pueblo Indian land subject only to approval by the Secretary of the Interior.

2. Congress confirmed Respondent's construction of § 17 by enacting specific right-of-way statutes for Pueblo Indian land on May 10, 1926, 44 Stat. 498 (the "1926 Act"), and April 21, 1928, ch. 400, § 1, 45

Stat 442, 25 U.S.C. § 322 (the "1928 Act").

3. Petitioner's construction of § 17 is repugnant to the 1926 and 1928 Acts and to the Act of February 5, 1948, c. 45 § 1, 62 Stat. 17, 25 U.S.C. § 323 to 328 (the "1948 Act").

4. Taos Pueblo endorses the additional arguments presented by Respondent and the other amici Pueblos.

ARGUMENT

1. SECTION 17 OF THE 1924 ACT CANNOT REASONABLY BE CONSTRUED TO AUTHORIZE GRANTS OF PUEBLO LAND SUBJECT ONLY TO APPROVAL BY THE SECRETARY OF THE INTERIOR.

Taos Pueblo endorses and supports the interpretation of § 17 set forth at length in Respondent's briefs herein and in the amicus briefs filed by other Pueblos in support thereof.

The 1924 Act expressly stated in its introductory section that Congress acted "in its sovereign capacity as guardian of said

Pueblo Indians." That capacity had been established with respect to the Pueblo Indians by (a) the Act of February 27, 1851, ch. 14, § 7, 9 Stat. 25, which extended to the Indian tribes of New Mexico the protection of the Nonintercourse Act of 1834, 25 U.S.C. § 177; (b) the Act of July 22, 1854, 10 Stat. 308, which created the office of the Surveyor General of New Mexico with specific instructions to determine the location and extent of Pueblo lands; (c) the Act of December 22, 1858, 11 Stat. 374, which confirmed the Surveyor General's surveys of Pueblo grant lands subsequently patented to them in 1864; and (d) the New Mexico Enabling Act of June 20, 1910, 36 Stat. 557, which recognized that the Pueblo Indians were under exclusive federal jurisdiction. The authoritative decisions of this Court relied, in addition, upon an unbroken succession of

Congressional acts in fulfillment of the government's guardianship role. U.S. v. Sandoval, 231 U.S. 28 (1913); U.S. v. Candelaria, 271 U.S. 432 (1926); U.S. v. Chavez, 290 U.S. 354 (1933).

In the Tenth Circuit, the federal courts have uniformly held that Pueblo lands have always been inalienable, under the federal guardianship, without Congress' authority. U.S. v. Algodones Land Co., 52 F.2d 359 (10th Cir. 1931); Alonzo v. U.S., 249 F.2d 189 (10th Cir. 1957); N.M. v. Aamodt, 537 F.2d 1102 (10th Cir. 1976); Plains Electric G & T Coop. v. Pueblo of Laguna, 542 F.2d 1375 (10th Cir. 1977). The decision below is merely the most recent in an unbroken series of precedents. Only certain decisions of the territorial and state courts deviated from the consistent federal recognition of the guardianship of the Pueblo Indians and the

concomitant restraint on alienation of their lands. Territorial law, however, was not part of governing federal law. See U.S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 704 (1899). For that reason, this Court's acceptance of the territorial court's description of the Pueblos in U.S. v. Joseph, 94 U.S. 614 (1876)¹, was not considered authoritative or binding when the question of Congress' power to establish the federal

¹ The Joseph decision recognized that a non-Indian in possession of Pueblo land "without the consent of the inhabitants. . . may be ~~either cited~~ or punished civilly, by a suit for trespass," 94 U.S. 614, 619. The case sustained demurrers to defective petitions to collect the penalty imposed by § 11 of the Nonintercourse Act on persons wrongfully occupying Taos Pueblo land. The Court's opinion did not consider whether Congress had the authority or intent to protect Pueblo lands against unauthorized alienation under § 12 of the Nonintercourse Act, and it did not deny the existence of the federal guardianship recognized by later decisions since the beginning of American sovereignty.

guardianship of the Pueblos was presented in the Sandoval case or in the Candelaria case when the origin of the guardianship was established. No federal court has ever held that the Pueblos were not under the federal guardianship or that the Pueblos were free to dispose of their lands without authority from Congress.

The 1924 Act was enacted in fulfillment and in furtherance of the federal guardianship of Pueblo lands. Non-Indians then in possession of Pueblo grant lands claimed ownership under purported "sales, grants, leases of various kinds, and other conveyances" by a Pueblo or an individual Pueblo Indian. Some of those instruments had been approved by the Secretary of the Interior under existing laws: tribal farming leases had been authorized in 1894, 25 U.S.C. § 402, mining leases in 1919 and 1921, 25 U.S.C.

§ 399, rights-of-way for highways, railways and telephone lines in 1899, 1901, 1904, and 1909, 25 U.S.C. §§ 311-321, grazing leases in 1891, 25 U.S.C. § 397, oil and gas or mining leases in 1909 and 1924, 25 U.S.C. §§ 396 and 398, contracts for farm lands in 1916 and 1921, 25 U.S.C. §§ 393-394, and timber stumpage in 1910 and 1921, 25 U.S.C. §§ 406-407.

Congress' solution to the tangled titles and conflicting claims within Pueblo grants was to create the Pueblo Lands Board to determine which "private claims" should be confirmed and the Pueblos' title extinguished. The criteria for confirmation were set forth in § 4: continued possession with color of title since 1902 or without color of title since 1889.

The language of § 17 seems clear and unambiguous in the context of its enactment

on June 7, 1924. The first clause "hereafter" prohibited any "right, title, or interest" in Pueblo lands "in any. . .manner" except "as may hereafter be provided by Congress." The second clause invalidated any "sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto" by a Pueblo or individual Indian "unless the same be first approved by the Secretary of the Interior." The second clause was an instruction to the Pueblo Lands Board and the federal courts with respect to instruments that might be offered in support of "private claims" under the 1924 Act. Congress intended thereby to protect any non-Indian interests properly approved by the Secretary in accordance with preexisting law against invalidity in the quiet title suits authorized in § 3. The first clause of § 17 looks forward; the second looks back. In the

future, no interest can be acquired unless Congress "hereafter" legislates. In the past, however, when Congress had failed to repudiate the erroneous judgments of the territorial and state courts, a variety of Pueblo and Indian instruments had been issued. Those were expressly invalidated by the second clause, unless "first approved" by the Secretary. Unspoken was the implied reference to the Secretary's extensive existing authority to approve various interests in Indian lands. If "first approved" an Indian grant was not necessarily valid. Approval under existing law saved the instrument from invalidity under § 17, but § 17 did not validate any pre-enactment action. Validity was to be decided by the Board or the federal court, but they had no jurisdiction under the Act to consider post-enactment actions.

The Board determined that non-Indian claimants to lands within the Pueblo grants had acquired no rights of any kind under territorial or state law; their claims could be validated only under § 4 of the Act. The federal courts sustained that determination of the Board's in quiet title suits filed under § 3 of the Act. U.S. v. Woodford, No. 1630 Eq. [Tesuque Pueblo], Order entered December 5, 1928; U.S. v. Herrera, No. 1720 .Eq. [Nambe Pueblo], Per Curiam Order entered May __, 1928; Garcia v. U.S., 43 F.2d 873, 878 (10th Cir. 1930) [San Juan Pueblo].

Congress' intent in § 17 was nevertheless frustrated by erroneous decisions of the Board's attorney, Special Assistant Attorney General George Fraser, who first concluded that existing statutes relating to Indian lands did not apply to the Pueblos because Congress had confirmed their

grants and had not concluded treaties with them. His erroneous decision required the Board to invalidate any pre-enactment rights-of-way or other interests in Pueblo lands previously approved by the Secretary. The Board's action was later cited by Congress as the reason for its enactment of the 1926 Act. To escape that harsh--and completely unnecessary and unwarranted--result, Mr. Fraser decided to treat as valid post-enactment rights-of-way approved under § 17. This was an obvious nonsequitur because the second clause of § 17 was intended only to invalidate pre-enactment Indian grants (unless approved by the Secretary under existing law); post-enactment interests were expressly barred except as authorized under later statutes, like the 1926 and 1928 Acts.

Petitioner, and the United States as

amicus, distorts this clear interpretation of § 17 by concocting the "voluntary-involuntary" distinction. Nowhere in § 17 or its legislative history, or in any document connected with the contemporaneous 1926 and 1928 Acts, did Congress suggest such a distinction between the first and second clauses of § 17. George Fraser tentatively suggested such a distinction in his explanatory letter as a way of resolving the "seeming contradiction" between the two clauses, but the "seeming contradiction" only existed because he erroneously concluded the Secretary had no preexisting authority over Pueblo lands. The present parties, seeking to sustain Fraser's error, argue that no other interpretation of § 17 is plausible. Instead, the obvious interpretation set forth above not only conforms to the facts of 1924, the language of the Act, and the mechanism created to resolve

the title problems of the Pueblos, but it proves how wrong Mr. Fraser was with respect to pre-enactment easements approved by the Secretary. The Court should not accept this effort to perpetuate an ancient error.

Congress by the second clause of § 17 did not intend to authorize the Secretary of the Interior at any time in the future to grant rights-of-way or other interests in Pueblo lands. The analyses of § 17 by Petitioner and the United States as amicus ignore the opening prohibition against any interest in Pueblo land being acquired "hereafter," after the date of enactment. If the Secretary, acting in accordance with existing law, had approved instruments before the date of enactment "made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians," they could be accepted by the Board and the federal courts

as having "validity in law or in equity" for purposes of validating a claim under § 4 or § 5. But the first clause of § 17 barred any post-enactment action by the Secretary except in accordance with subsequent legislation. The construction urged by Petitioner asks the Court to ignore the effect of the first clause -- by treating it as "separate" from the second clause and limited to "involuntary" transactions -- and the fact that Congress did not in § 17 expressly delegate power to the Secretary as it did in § 16 of the Act.

The language of the second clause says that no purported conveyance of land by a Pueblo or Pueblo Indian shall be valid unless first approved by the Secretary. Giving effect to the first "hereafter" in the first clause requires the second clause to be limited to pre-enactment periods, not

extended into the indefinite future regardless of laws "hereafter [to] be provided by Congress." The negative language of the second clause does not imply the converse. Subsequent authorization was a precondition for acquisition of any interest in Pueblo lands "in any . . . manner," including a voluntary transfer by a Pueblo. There is no principle of logic or statutory construction under which an affirmative grant of power may be inferred from an express denial of the power. The analogy to § 12 of the Nonintercourse Act drawn by Francis Wilson, who drafted the language, does not suggest a waiver of restraints on alienation for post-enactment periods. Wilson stated that he had adapted the language of § 12 of the Nonintercourse Act to conform to conditions peculiar to the Pueblo. Those conditions included improvident conveyances

by Pueblos and individual Indians, which were expressly invalidated by the second clause of § 17, saving only those instruments that had been approved by the Secretary under existing law.

In that context, the first clause of § 17 served as general notice of the requirement for congressional authority before any acquisition of an interest in Pueblo lands could be acquired after June 7, 1924. The second clause gave specific notice that the Pueblos and their individual members could no longer consent to conveyances of interests in their lands without first obtaining the approval of the Secretary, who would then, under the first clause, have to determine whether or not congressional authority for such conveyances existed. The second clause thus ensured that the Secretary, rather than the Indians, would be

responsible for determining what their rights were with respect to land transactions. Such control was intended to prevent a recurrence of the conditions that left the Pueblos for over half a century dependent upon their own uninformed judgment with respect to land transactions.

Unfortunately, Congress' intent was frustrated by George Fraser's mistake. Once begun, his error was repeated and perpetuated, but like any error, it was baseless, and the Court should now correct it by affirming the court below. Perpetuation of an error by subordinate employees is not entitled to the dignity of an official administrative interpretation intended by Congress to flesh out the bare bones of its statutory language. Here, it is obvious that Mr. Fraser's error defeated Congress' intent, which was clearly expressed in the language,

as the courts below held, and its subsequent actions with respect to Pueblo lands were consistent with that interpretation and inconsistent with the Petitioner's contention that § 17 was a general, unrestricted grant of authority to the Secretary to approve any disposition of Pueblo Indian lands at any time in the future. Their argument claims too much. Like the contention that negative terms constitute an affirmative grant of authority, Petitioner would have the Court approve what Congress took pains to prevent.

2. CONGRESS CONFIRMED RESPONDENT'S CONSTRUCTION OF § 17 BY ENACTING SPECIFIC RIGHTS-OF-WAY STATUTES FOR PUEBLO INDIAN LAND IN 1926 AND 1928.

Congress passed the 1926 Act after it was advised that the Pueblo Lands Board had decided that existing statutes for acquiring rights-of-way over Indian land did not apply to the Pueblos. In the legislative history

of that Act, Congress did not suggest that it was authorizing condemnation of Pueblo lands under state law because a right-of-way was not obtainable under § 17. The suggestion in the government's amicus brief (pp. 24-25), that "it seems reasonable to assume that Congress was apprised of the circumstances" that two Pueblos approved rights-of-way "under Section 17" while a third refused, is completely unwarranted. Congress responded to an apparent need to provide a means for acquiring rights-of-way for legitimate projects. Had it believed § 17 authorized such a grant, no further legislation would have been necessary. Its opposite conclusion and passage of the 1926 Act prove that Congress did not construe § 17 as Petitioner now contends.

As stated in Plains Electric G & T Corp. v. Pueblo of Laguna, 542 F.2d 1375, 1377

(10th Cir. 1977), the federal district court later held the 1926 Act defective because it failed to authorize joinder of the United States, the Pueblo's guardian, as a party defendant in the condemnation action. Congress then passed the 1928 Act making applicable to Pueblos the existing right-of-way statutes, under which the Secretary had previously granted rights-of-way on Pueblo lands. Congress thus repudiated George Fraser's fundamental error, and by implication, his erroneous construction of § 17.

The Tenth Circuit held in Plains Electric that the 1926 Act was repugnant to the 1928 Act and that the earlier law was therefore repealed by implication. The only possible inference from that action is Congress' understanding that, pursuant to § 17 of the 1924 Act, Secretarial authority

to grant rights-of-way over Pueblo lands must be given by new legislation. Congress obviously did not construe § 17 as an effective grant of authority to the Secretary to approve interests in Pueblo lands.

3. PETITIONER'S CONSTRUCTION OF § 17 IS REPUGNANT TO THE 1926, 1928, AND 1948 ACTS.

The legislative history of the 1926, 1928, and 1948 Acts, not considered by Petitioner or the United States amicus, contains no suggestion that § 17 previously authorized grants of rights-of-way by the Secretary with tribal consent. Had Congress understood § 17 to have that effect, it surely would have commented upon its relationship to the later statutes. Section 17 was not mentioned because Congress did not believe it had the legal effects erroneously attributed to it by Mr. Fraser originally and latterly by Petitioner and its supporters.

In the 1926, 1928, and 1948 Acts Congress provided specific methods of acquiring rights-of-way on Pueblo lands. In each case, an applicant had to meet stated requirements. In the short-lived 1926 condemnation Act, state requirements for condemnation actions were mandated, and the 1928 and 1948 Acts contemplated regulations to protect Indian interest. 25 U.S.C. §§ 322, 328. Petitioner's construction of § 17 proposes an evasion of such requirements by Secretarial approval outside regularly established procedures.

The proposed construction is unsatisfactory because it infers affirmative authority from negative language, is not supported by even the slightest indication of Congressional approval, and creates an exception for the the Pueblos from the general system of protection applicable to

Indian tribes generally. Petitioner's § 17 Line on Taos Pueblo land, for instance, does not comply with the requirements of the regulations authorized by Congress. 25 C.F.R. § 169.1 et seq. Congress surely did not intend to accord the Pueblos less protection than other Indian tribes by permitting an evasion of the safeguards of the 1926, 1928, and 1948 Acts and their attendant regulations and requirements. Any post-1926 right-of-way approved under § 17 without compliance with the requirements of the 1926, 1928, or 1948 Acts should, therefore, be held void for failure to satisfy the specific protective requirements of those statutes. In 1927, Petitioner could have acquired its right-of-way by condemnation under the 1926 Act or from the Secretary under the Acts of March 2, 1899, or March 3, 1901 [25 U.S.C. §§ 312-314, 318]. Consensual

agreements with the Pueblos were never prohibited or discouraged. There was obviously no need for Mr. Fraser's attempted circumvention under § 17, and the construction of that provision required to justify the attempt was repugnant to Congress' actions in 1926, 1928, and 1948, which were clearly consistent with § 17.

4. TAOS PUEBLO ENDORSES THE ADDITIONAL ARGUMENTS PRESENTED BY RESPONDENT AND THE OTHER AMICI PUEBLOS.

The other principle arguments presented in opposition to Petitioner's claims are (a) the irrelevancy of administrative practice that is inconsistent with a statute, and (b) the non-binding effect of the dismissal of Petitioner from the quiet title suits instituted pursuant to § 3 of the 1924 Act.

With respect to the first argument, the record discloses that the original error of George Fraser's was perpetuated by various

officials without further legal opinion, ruling or regulation. The history of these actions is less a "course of administrative interpretation" than an uncertain, rather sheepish repetition of the original error, as if to avoid impeaching the earlier actions by further unauthorized approvals. After the 1948 Act, only a few rights-of-way for irrigation or drainage works were approved under § 17, and no instruments have been approved since 1959. [Kelly Report, p. 68.] Congress' intent and the underlying purpose of § 17 are clear, and the inconsistent actions of subordinate employees of the executive branch may properly be ignored upon the authorities cited in Respondent's briefs.

The second argument refers to judicial actions, rather than executive, that also followed from Mr. Fraser's error. The dismissal of Petitioner from the Brown case

involving Respondent's lands was repeated in the district court's dismissal of the Petitioner in the Wooten case pertaining to Taos Pueblo's lands. Those actions obviously did not involve any adjudication on the merits (although Petitioner had filed an answer in Wooten shortly before entry of the "decree" of dismissal); nor did the Court have jurisdiction under § 3 of the 1924 Act to review, consider, and approve Mr. Fraser's erroneous construction of § 17. Cf. Cramer v. U.S., 261 U.S. 219, 230-234 (1923). The court entered the dismissal because the government was willing to drop its claims against Petitioner. There was no "consent decree" sufficient to validate Petitioner's § 17 Line under § 5 of the 1924 Act. The government merely dropped its challenge of Petitioner's claims because the Secretary had approved the right-of-way. For the reasons

stated in Respondent's briefs, and in the United States' amicus brief, the court's action had no res judicata effect. The pending action instituted by the United States to recover damages for Taos Pueblo based upon Petitioner's unauthorized use of its property for telephone purposes should go forward in the district of New Mexico.

CONCLUSION

For the foregoing reasons, Taos Pueblo prays as amicus curiae that the decision of the Tenth Circuit Court of Appeals below be affirmed. The practical consequences of this action are not significant, the Secretary of the Interior no longer considers § 17 a valid basis for approving Pueblo grants of rights-of-way or other interests as indicated by the Solicitor's letter dated October 31, 1984, attached as an appendix hereto, and the language and intent of the 1924 Act plainly

justify the decision below.

Respectfully submitted,

WILLIAM C. SCHAAB
Rodey, Dickason, Sloan, Akin
& Robb, P.S.
Post Office Box 1888
Albuquerque, New Mexico 87103
Telephone: (505) 765-5900

By William C. Schaab
William C. Schaab

Attorney for the Pueblo of
Taos, Amicus Curiae

January 7, 1985

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

No. 84-262

THE MOUNTAIN STATES TELEPHONE AND
AND TELEGRAPH COMPANY, PETITIONER

v.
PUEBLO OF SANTA ANA

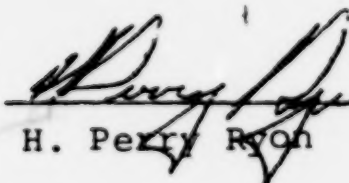
On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

CONSENT TO FILING OF TAOS PUEBLO
BRIEF AMICUS CURIAE

The undersigned hereby consent to the
filing on behalf of Taos Pueblo of a brief
amicus curiae in support of the respondent
herein.

KATHRYN MARIE KRAUSE
Attorney for Petitioner
931 14th Street, Room 1300
Denver, Colorado 80202

By


H. Perry Ryan

LUEBBEN, HUGHES & TOMITA
Attorneys for Respondent
201 Broadway S.E.
Albuquerque, New Mexico 87102

By Scott E. Borg
Scott E. Borg

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PROOF OF SERVICE OF TAOS PUEBLO
BRIEF AMICUS CURIAE

I, WILLIAM C. SCHAAB, attorney for Taos Pueblo, amicus curiae herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of January, 1985, I served copies of the foregoing Brief Amicus Curiae on the several parties thereto, as follows:

1. On the United States, by leaving a copy thereof at the office of William L. Lutz, Esq., United States Attorney for the District of New Mexico, at the Federal Building, 500 Gold S.W., 12th Floor, and by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530.

2. On the Petitioner and other amici curiae, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record, as follows:

KATHRYN MARIE KRAUSE
Attorney for Petitioner

SCOTT E. BORG
Attorney for Respondent

PAUL BARDECKE, Attorney General
Attorney for State of New Mexico,
Amicus Curiae

L. LAMAR PARRISH
Attorney for The All Indian Pueblo Council,
Pueblos of Isleta, Sandia, Santa Clara,
San Juan, Laguna and Jemez,
Amicus Curiae

PETER C. CHESTNUT
Attorney for Pueblo of Acoma
Amicus Curiae

JOHN R. COONEY
Attorney for Atchison, Topeka
& Santa Fe Railway,
Amicus Curiae

ROBERT H. CLARK
Attorney for Public Service Co.
of New Mexico,
Amicus Curiae

William C. Schaab
WILLIAM C. SCHAAB
Attorney for Taos Pueblo
P.O. Box 1888
Albuquerque, NM 87103
(505) 765-5900

No. 84-262

Office-Supreme Court, U.S.

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JAN 7 1985

ALEXANDER L. STEVENS

CLERK

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— 0 —
On Writ of Certiorari to the United States
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— 0 —
BRIEF FOR RESPONDENT

— 0 —
RICHARD W. HUGHES

Counsel of Record

SCOTT E. BORG

S. JAMES ANAYA

LUEBBEN, HUGHES & TOMITA

201 Broadway, S. E.

Albuquerque, NM 87102

(505) 842-6123

*Attorneys for Respondent Pueblo
of Santa Ana*

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE:	
Introduction	1
Procedural History	3
Status of the Pueblos Prior To The Pueblo Lands Act	5
The Pueblo Lands Act	8
Conveyances Under Section 17	9
The Mountain Bell Right-of-Way	10
SUMMARY OF ARGUMENT	11
ARGUMENT:	
I. SECTION 17 OF THE PUEBLO LANDS ACT WAS A REAFFIRMATION OF THE FEDERAL GUARDIANSHIP OVER PUEBLO LANDS, NOT A GRANT OF POWER TO CONVEY THOSE LANDS.	12
A. The Pueblo Lands Act and its legislative history manifest Congress' intention to <i>prevent</i> future losses of Pueblo lands, not facilitate them.	13
B. Section 17 was intended by Congress to ratify the implications of <i>Sandoval</i> and reaffirm the status quo reflected in the Enabling Act and the Nonintercourse Act.	18
C. Petitioner's interpretation of Section 17 is convoluted, creates redundancies, and leads to anomalous consequences, all in defiance of common sense explanation.	24
D. Interpreting Section 17 as authority for conveyances would be contrary to Congress' consistent practice with respect to conveyances of Indian tribal lands.	28

TABLE OF CONTENTS—Continued

E. There is no basis here for invocation of the doctrine of deference to administrative interpretation.	32
II. MOUNTAIN BELL'S DISMISSAL FROM UNITED STATES v. BROWN IS NO BAR TO THIS ACTION.	39
A. Res judicata does not bar litigation of the validity of the § 17 right-of-way because the issue could not have been adjudicated in <i>United States v. Brown</i>	40
B. The adjudication in <i>Brown</i> was not on the merits.	42
C. No consent decree was entered.	45
CONCLUSION	48
APPENDIX	App. 1

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

TABLE OF CASES:

<i>Adamo Wrecking Co. v. United States</i> , 434 U.S. 275 (1978)	34
<i>Alonzo v. United States</i> , 249 F.2d 189 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958)	21, 22, 23
<i>Arizona v. San Carlos Apache Tribe</i> , 103 S.Ct. 3211 (1983)	23
<i>Ash Sheep Co. v. United States</i> , 252 U.S. 159 (1920)	40
<i>Bailey v. Bannister</i> , 200 F.2d 687 (10th Cir. 1952)	25
<i>Barlow v. Collins</i> , 397 U.S. 159 (1970)	32, 34
<i>Barnes v. Chicago, M. & St. Paul Ry. Co.</i> , 122 U.S. 1 (1887)	44
<i>Bernier v. Bernier</i> , 147 U.S. 242 (1893)	15

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES—Continued

	Page
<i>Bob Jones University v. United States</i> , 103 S.Ct. 2017 (1983)	39
<i>Bowless v. Capitol Parking Co.</i> , 143 F.2d 87 (10th Cir. 1944)	40
<i>Bryan v. Itasca County</i> , 426 U.S. 373 (1976)	21, 23, 30
<i>Chemehuevi Tribe of Indians v. Fed. Power Comm.</i> , 420 U.S. 394 (1975)	33, 36
<i>Chercon U.S. v. Natural Resource Defense Council</i> , 104 S.Ct. 2778 (1984)	32, 33, 37
<i>Chicot County Drainage Dist. v. Baxter State Bank</i> , 308 U.S. 371 (1940)	46
<i>Chippewa Indians v. United States</i> , 307 U.S. 1 (1939)	29
<i>Choctaw Nation v. Oklahoma</i> , 397 U.S. 620 (1970)	11
<i>Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee</i> , 412 U.S. 94 (1933)	34
<i>Corelo Indian Community v. Watt</i> , 551 F.Supp. 366 (D.D.C. 1982), aff'd, 10 Ind.L.Rep. 3008 (D.C. Cir. 1982)	1
<i>Cramer v. United States</i> , 261 U.S. 219 (1922)	38
<i>Creek Nation v. United States</i> , 168 Ct.Cl. 483 (1964)	40
<i>Delaware Tribal Business Comm. v. Weeks</i> , 430 U.S. 75 (1977)	29, 32
<i>DeVoll v. Bailar</i> , 568 F.2d 1162 (5th Cir. 1978)	43
<i>Donald F. Duncan, Inc. v. Royal Tops Mfg. Co.</i> , 343 F.2d 655 (7th Cir. 1965)	47
<i>East Tennessee Tel. Co. v. Board of Councilmen</i> , 190 F. 346 (C.C. Ky., 1911)	42

TABLE OF CASES, STATUTES AND
OTHER AUTHORITIES—Continued

	Page
<i>E. I. DuPont de Nemours & Co. v. Collins</i> , 432 U.S. 46 (1977)	34, 36
<i>Escondido Mut. Water Co. v. La Jolla Indians</i> , 104 S.Ct. 2105 (1984)	37
<i>F.E.C. v. Democratic Senatorial Campaign Committee</i> , 454 U.S. 27 (1981)	34
<i>F.E.C. v. Tuscarora Indian Nation</i> , 362 U.S. 99 (1960)	27
<i>Federal Maritime Commission v. Seatrain Line, Inc.</i> , 441 U.S. 726 (1973)	37
<i>Firefighters Local Union No. 1784 v. Stotts</i> , 104 S.Ct. 2576 (1984)	42
<i>Franklin v. Lynch</i> , 233 U.S. 269 (1914)	26, 28
<i>Garcia v. United States</i> , 43 F.2d 873 (10th Cir. 1930)	14, 23
<i>Haig v. Agee</i> , 453 U.S. 2801 (1981)	38
<i>Harriman v. Northern Security Co.</i> , 197 U.S. 244 (1905)	44
<i>Jacobs v. Marks</i> , 182 U.S. 583 (1901)	46
<i>Johnson v. McIntosh</i> , 21 U.S. (8 Wheat.) 543 (1823)	23, 30
<i>Kent v. Dulles</i> , 347 U.S. 117 (1938)	39
<i>Lawlor v. National Screen Service</i> , 349 U.S. 322 (1955)	40
<i>Lower Sioux Indian Community v. United States</i> , 626 F.2d 828 (Ct.Cl. 1980)	40

TABLE OF CASES, STATUTES AND
OTHER AUTHORITIES—Continued

	Page
<i>Mattz v. Arnett</i> , 412 U.S. 481 (1973)	32
<i>Mellon v. Minneapolis St. P. & S.S.M. Ry. Co.</i> , 11 F.2d 332 (D.C. Cir. 1926), <i>cert. denied</i> , 271 U.S. 678 (1926)	42
<i>Menominee Tribe v. United States</i> , 391 U.S. 404 (1968)	13, 32
<i>Nambe v. Romero</i> , 61 P. 122 (N.M. 1900)	6
<i>National Bank of Louisville v. Stone</i> , 174 U.S. 432 (1899)	42
<i>National Life & Accident Insurance Co. v. Parkinson</i> , 136 F.2d 506 (10th Cir. 1943)	46
<i>Newman v. Hiltat Elkhorn Coal Co.</i> , 302 F.2d 723 (6th Cir. 1962)	40
<i>New Mexico v. Aamodt</i> , 537 F.2d 1102 (10th Cir. 1976), <i>cert. denied</i> , 429 U.S. 1121 (1977), No. 6639M (D.N.M.)	3, 6, 23, 30
<i>North Carolina R.R. v. Story</i> , 268 U.S. 288 (1925)	44
<i>Northern Cheyenne Tribe v. Hollowbreast</i> , 425 U.S. 649 (1976)	29, 30
<i>Norton v. Larney</i> , 266 U.S. 511 (1925)	44
<i>N. Sims Organ & Co. v. S.E.C.</i> , 293 F.2d 78 (2d Cir. 1961), <i>cert. denied</i> , 368 U.S. 968 (1962)	43
<i>Oklahoma v. Texas</i> , 272 U.S. 21 (1926)	44
<i>Oliphant v. Suquamish Indian Tribe</i> , 435 U.S. 191 (1978)	23, 24
<i>Oneida Indian Nation v. County of Oneida</i> , 414 U.S. 661 (1974)	23
<i>Overton Park v. Volpe</i> , 401 U.S. 402 (1971)	34
<i>Pickering v. Lomax</i> , 145 U.S. 310 (1892)	30

TABLE OF CASES, STATUTES AND
OTHER AUTHORITIES—Continued

	Page
<i>Piper v. Chris-Craft Industries, Inc.</i> , 430 U.S. 1 (1977)	34
<i>Plains Electric Generation and Transmission Co-op. v. Pueblo of Laguna</i> , 542 F.2d 1375 (10th Cir. 1976)	23, 27, 31
<i>Power Reactor Devel. Co. v. Int'l Union of Electrical Workers</i> , 367 U.S. 396 (1961)	38
<i>Pueblo de Taos v. Archuleta</i> , 64 F.2d 807 (10th Cir. 1933)	43
<i>Pueblo of Santa Rosa v. Fall</i> , 273 U.S. 315 (1927)	22, 26
<i>Rheinberger v. Security Life Ins. Co.</i> , 146 F.2d 680 (7th Cir. 1945)	41
<i>Richards v. United States</i> , 369 U.S. 1 (1962)	13
<i>Richardson v. City of Boston</i> , 60 U.S. 263 (1856)	40
<i>Rowan v. United States</i> , 252 U.S. 247 (1981)	34
<i>Securities and Exchange Commission v. Sloan</i> , 436 U.S. 103 (1977)	34, 37, 38
<i>Sidmore v. Swift & Co.</i> , 323 U.S. 134 (1949)	34
<i>Solem v. Bartlett</i> , 104 S.Ct. 1161 (1984)	30
<i>Southern Pacific Transp. Co. v. Watt</i> , 700 F.2d 550 (9th Cir. 1983), <i>cert. denied</i> , 104 S.Ct. 393 (1983)	30
<i>Swift v. McPherson</i> , 232 U.S. 51 (1914)	42
<i>System Federation v. Wright</i> , 364 U.S. 642 (1961)	42
<i>Texas & Ry. Co. v. Southern Pacific Co.</i> , 137 U.S. 48 (1890)	47
<i>Three Affiliated Tribes v. Wold Engineering</i> , 104 S.Ct. 2267 (1984)	23

TABLE OF CASES, STATUTES AND
OTHER AUTHORITIES—Continued

	Page
<i>United Shoe Mach. Co. v. United States</i> , 258 U.S. 451 (1922)	41, 44
<i>United States v. Abeyta</i> , No. 2135 Equity (D.N.M. June 25, 1931)	41, 42
<i>United States v. Abeyta</i> , No. 1933 Equity (D.N.M. May 24, 1931)	43
<i>United States v. Arenas</i> , 158 F.2d 730 (9th Cir. 1947), <i>cert. denied</i> , 331 U.S. 842 (1947)	33
<i>United States v. Armijo</i> , No. 2080 Equity (D.N.M. Nov. 2, 1931)	2
<i>United States v. Arvizo</i> , No. 2079 Equity (D.N.M. May 14, 1931)	2
<i>United States v. Board of National Missions</i> , 37 F.2d 272 (10th Cir. 1929)	23
<i>United States v. Boisdore's Heirs</i> , 49 U.S. (8 How.) 113 (1850)	14
<i>United States v. Brown</i> , No. 1814 Equity (D.N.M. May 31, 1929)	<i>passim</i>
<i>United States v. Campbell</i> , No. 709 Equity (D. N.M. Orders filed November 17, 1921 and March 6, 1923)	8
<i>United States v. Candelaria</i> , 271 U.S. 432 (1926)	8, 10, 22, 48
<i>United States v. Cartwright</i> , 411 U.S. 546 (1973)	38
<i>United States v. Chavez</i> , 290 U.S. 354 (1933)	4, 14, 23, 24, 48
<i>United States v. Clark</i> , 454 U.S. 555 (1982)	37

TABLE OF CASES, STATUTES AND
OTHER AUTHORITIES—Continued

	Page
<i>United States v. Herrera</i> , No. 1720 Equity (D.N.M. <i>per curiam</i> , May 24, 1928)	41
<i>United States v. Joseph</i> , 94 U.S. 614 (1876)6, 7, 8, 17, 18	
<i>United States v. Lucero</i> , 1 N.M. 422 (1869)	6
<i>United States v. Mares</i> , 88 P. 1128 (N.M. 1907)	6
<i>United States v. Midwest Oil Co.</i> , 336 U.S. 459 (1915)	38
<i>United States v. Mitchell</i> , 445 U.S. 535 (1980)	24
<i>United States v. Mitchell</i> , 103 S.Ct. 2961 (1983)	31
<i>United States v. Palmer</i> , 16 U.S. (3 Wheat.) 610 (1818)	20
<i>United States v. Parker</i> , 120 U.S. 89 (1887)	46, 47
<i>United States v. Pueblo of Taos</i> , 515 F.2d 1404 (Ct.Cl. 1975)	43
<i>United States v. Sandoval</i> , 198 Fed. Rep. 539 (D. N.M. 1912)	7
<i>United States v. Sandoval</i> , 231 U.S. 28 (1913).....	<i>passim</i>
<i>United States v. Santa Fe Pac. Ry. Co.</i> , 314 U.S. 339 (1941)	30
<i>United States v. U.S. Fidelity & Guaranty</i> , 309 U.S. 506 (1940)	42, 46
<i>United States v. University of New Mexico</i> , 731 F.2d 703 (10th Cir. 1984), <i>cert. denied</i> , — U.S. — (1984)	14, 23
<i>United States v. Vogel</i> , 455 U.S. 16 (1982)	33, 34, 38
<i>United States v. Waller</i> , 243 U.S. 459 (1917)	24
<i>United States v. Wooten</i> , 40 F.2d 882 (10th Cir. 1930)	8, 41, 43

TABLE OF CASES, STATUTES AND
OTHER AUTHORITIES—Continued

	Page
<i>Vicksburg v. Henson</i> , 231 U.S. 259 (1913)	44
<i>Zemel v. Rusk</i> , 381 U.S. 1 (1965)	36
<i>Zenith Radio Corp. v. United States</i> , 437 U.S. 443 (1978)	36
<i>Zuber v. Allen</i> , 396 U.S. 168 (1969).....	36
STATUTES AND LEGISLATIVE MATERIALS:	
Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 25 U.S.C. § 177 (Indian Nonintercourse Act)	<i>passim</i>
Act of February 2, 1848, 9 Stat. 922 (United States-Mexico Treaty of Guadalupe Hidalgo)	5
Act of February 27, 1851, ch. 14, § 7, 9 Stat. 587.....	5
Act of February 18, 1887, ch. 119, 24 Stat. 388 (General Allotment Act)	30
Act of March 3, 1891, ch. 539, 26 Stat. 854	6
Act of June 20, 1910, 36 Stat. 557 (New Mexico Enabling Act)	6, 7, 8, 21, 22, 23, 25
Act of June 7, 1924, ch. 331, 43 Stat. 636 (Pueblo Lands Act)	<i>passim</i>
Act of May 10, 1926, ch. 282, 44 Stat. 498	39
Act of May 31, 1933, ch. 45, § 7, 48 Stat. 111	17
Act of April 21, 1928, ch. 400, 45 Stat. 442, 25 U.S.C. § 322	21, 27, 36, 37
Act of May 31, 1933, ch. 45, 48 Stat. 108	9, 17, 21
Pub.L. 90-570, 82 Stat. 1003 (1968)	27
Pub.L. 97-394, 96 Stat. 1976 (1982)	1
25 U.S.C. § 177	4
25 U.S.C. §§ 311-322	20, 31

TABLE OF CASES, STATUTES AND
OTHER AUTHORITIES—Continued

	Page
25 U.S.C. § 311	31
25 U.S.C. § 312	31
25 U.S.C. § 319	31
25 U.S.C. § 321	31
25 U.S.C. § 323	31
25 U.S.C. § 349	21, 30
25 U.S.C. § 372	30
25 U.S.C. § 393	20
25 U.S.C. § 396	20
25 U.S.C. § 396a	31
25 U.S.C. § 396b	31
25 U.S.C. § 397	20
25 U.S.C. § 398	20
25 U.S.C. § 407	20
25 U.S.C. § 415	27, 31
25 U.S.C. §§ 396a-415	31
28 U.S.C. § 2415	1
48 Fed.Reg. 13698-13920, 51204-51268 (1983)	1
48 Fed.Reg. 13891-13899 (1983)	2
64 Cong.Rec. 5326-5327 (1924)	45
67 Cong.Rec. 8633-8634 (1926)	39
H.R. Rep. No. 1748, 67th Cong., 4th Sess. 7 (1923)	8, 24
H.R. Rep. No. 787, 68th Cong. 1st Sess. 2 (1924)	23, 24
S. Rep. No. 492, 68th Cong., 1st Sess. 3 (1924)	19, 20, 23
S. 3855, 67th Cong., 2d Sess. § 16 (1922) (Bursum Bill of 1922)	16

TABLE OF CASES, STATUTES AND
OTHER AUTHORITIES—Continued

	Page
<i>Hearings on S. 3855 and S. 4223 Before a Subcomm. of the Comm. on Public Lands And Surveys, 67th Cong., 4th Sess. (1923)</i>	5, 8, 9, 15, 16, 27
<i>Hearings on H.R. 13452 and H.R. 13674 Before the Comm. on Indian Affairs, 67th Cong., 4th Sess. (1923)</i>	9, 15, 27
OTHER AUTHORITIES:	
Abel, A., <i>The Official Correspondence of James S. Calhoun</i> , (Office of Indian Affairs 1915)	5
<i>Black's Law Dictionary</i> (5th ed. 1979)	20
Chambers, Reid P. and Price, Monroe, <i>Regulating Sovereignty: Secretarial Discretion and the Leas- ing of Indian Lands</i> , 26 Stanford L.Rev. 1061 (1974)	29
Coffman, <i>Judicial Review of Administrative In- terpretations of Statutes</i> , 6 W.N. Eng.L.Rev. 1.....	33
Cohen, Felix, <i>Handbook of Federal Indian Law</i> (U. N.M. reprint of 1942 ed.)	11, 22
Cohen, Felix, <i>Handbook of Federal Indian Law</i> (1982 ed.)	22, 32
Dumars, C., O'Leary, M., Utton, A., <i>Pueblo Indian Water Rights: Struggle for a Precious Re- source</i> (1984)	3, 22
9 <i>Handbook of North American Indians</i> (1979)	1
Kelly, Lawrence C., <i>The Assault on Assimilation; John Collier and the Origin of Indian Policy Reform</i> (1983)	8, 16, 29
Kelly, Lawrence C., <i>Section 17 of the Pueblo Lands Act: A Study of Legislative History and Ad- ministrative Practice</i> (unpublished manuscript 1984)	passim
White, Koch, Kelly & McCarthy, <i>Land Title Study</i> (New Mexico State Planning Office 1971)	6

STATEMENT OF THE CASE

Introduction

The Pueblo of Santa Ana is one of nineteen Indian tribes in New Mexico called Pueblos, a term distinguishing them for their centuries-old stone and adobe villages and a communal way of life based largely upon irrigated agriculture.¹

This case arose from efforts of the Bureau of Indian Affairs in the late 1970s to identify damage claims on behalf of Indian tribes, especially trespass matters, that would be barred by the statute of limitations contained in 28 U.S.C. §2415.² Early in that process, the government identified rights-of-way purportedly authorized under Section 17 of the Act of June 7, 1924, ch. 331, 43 Stat. 636 (hereinafter, the Pueblo Lands Act) as a significant category of probable Pueblo trespass claims. Because the interpretation of Section 17 that had led to the right-of-way grants cast doubt on the status of the Pueblo Indians, and because of the government's hesitance in filing suit.

¹ See generally, 9 *Handbook of North American Indians* (1979).

² Prior to the original enactment of 28 U.S.C. § 2415, in 1966, there was no limitation period for damage claims brought by the United States on behalf of Indian tribes. That section imposed a six-year and ninety-day limitation period on such claims, and provided that claims arising before the statute, the so-called "old claims," had to be filed within six years and ninety days from the statute's enactment. Due to government inaction with respect to the old claims, the limit for filing them was repeatedly extended, but Congress grew increasingly insistent on action on the claims, estimated to number in the thousands. See *Covelo Indian Community v. Watt*, 551 F. Supp. 366, 369 (D.D.C. 1982), *aff'd*, 10 Ind.L.Rep. 3008 (D.C. Cir. 1982). As a result of Congress' latest effort to deal with this problem, see Pub.L. 97-394, 96 Stat. 1976 (1982), the identified claims have been listed at 48 Fed. Reg. 13698-13920, 51204-51268 (1983).

the Pueblo of Santa Ana brought this case on its own in 1980.

Although 79 rights-of-way were granted over Pueblo land under Section 17 (compared with 779 under other authority), App. 1, only about 50 were determined to present viable trespass claims. See 48 Fed. Reg. 13891-13899 (1983). Since this case was filed, most of these have been resolved. For example, Petitioner Mountain States Telephone & Telegraph Co. (also known as Mountain Bell), has settled almost all of its trespass claims, and of the 26 rights-of-way it acquired under Section 17 only two lines remain standing, one of which has been reauthorized under valid authority. App. 2. Most other companies still using easements originally granted under Section 17 have renegotiated those easements under valid authority.³ *Amicus* Atchison, Topeka & Santa Fe Railway Co. (AT&SF), whose briefs make disingenuous claims of disrupted interstate rail service and costly track relocation if the decision below stands (AT&SF *Cert. Br.* at 2-4; AT&SF *Br.* at 2-3), actually has less than a quarter of its main line track across Pueblo lands under Section 17.⁴ App. 1-3. Contrary to AT&SF's grandiose assertions about having to rebuild its line over the mountains, no existing line has ever

³ For example, *amicus* Public Service Company of New Mexico (PNM), whose brief claimed that the decision below threatens its statutory duty "to provide efficient and reasonable electric service generally," PNM *Br.* at 3, has renegotiated all but one of its Section 17 rights-of-way, and the remaining one expires by its terms in 1986. App. 3.

⁴ Most of that mileage is at Acoma and Laguna. The Section 17 deeds for that trackage were incorporated into "Final Decrees" entered by consent in the quiet title suits filed under the Pueblos Lands Act, *United States v. Arvizo*, No. 2079 Equity (D.N.M. May 14, 1931), and *United States v. Armijo*, No. 2080 Equity (D.N.M. Nov. 2, 1931), and thus AT&SF may well have defenses to trespass claims with respect to those deeds not available to Mountain Bell here. See discussion *infra* at 45-48.

had to be relocated outside Pueblo lands in the settlement of these claims, nor do the Pueblos have any interest in such a result. AT&SF (like *amicus* State of New Mexico) may, at the most, have to negotiate lawful rights-of-way for a few short sections of its line.

Settlement of these claims has been aided by a realization that trespass damages for the claims, if any, would probably be nominal. App. 5-7. In short, the hyperbole about uprooted titles and economic upheaval must be disregarded. On its merits, this case is virtually moot. What Petitioner and *amici* are evidently seeking in this proceeding is a ruling that will place the Pueblos in a unique status, stripped of the federal law protections afforded other Indian tribes for their lands and water rights.⁵

This action presents the question whether Congress, in a statute expressly intended to confirm its guardianship of Pueblo lands and to preclude their loss or alienation, at the same time granted to the Pueblos or their individual members broad power to alienate those lands merely upon approval by the Secretary of the Interior.

Procedural History

This case is before this Court on interlocutory appeal after the district court rejected Petitioner's motion for summary judgment and entered partial judgment for San-

⁵ The effect of the Pueblo Lands Act is a key and hotly litigated issue in the first adjudication of Pueblo water rights, *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977), No. 6639M (D.N.M.), which has been before the courts since 1966. *Amici* State of New Mexico and PNM are primary litigants in that proceeding. See PNM *Br.* at 3-4, n. 9; and see generally, C. Dumars, M. O'Leary, A. Utton, *Pueblo Indian Water Rights: Struggle for a Precious Resource* (1984) (hereinafter, *Pueblo Water Rights*). The presiding judge in *Aamodt* also decided the instant case in the district court.

ta Ana.⁶ (J.A. 85-94). The district court found Mountain Bell's position anomalous in view of the purpose of the Act, and concluded that Section 17 was simply a declaratory reaffirmation of Congress' guardianship. *Id.*

The court of appeals affirmed on the basis of the literal meaning of Section 17, emphasizing the long-standing position of this Court and the Tenth Circuit that the Pueblos "are subject to the legislation of Congress enacted for the protection of tribal Indians and their property," particularly the Nonintercourse Act, 25 U.S.C. § 177. (J.A. 102, quoting *United States v. Chavez*, 290 U.S. 357, 362 (1933).) The court of appeals rejected the proffered agency interpretation of Section 17 because it conflicted with the "plain congressional intent" of Section 17.⁷

⁶ Mountain Bell argued in part that the fact of conveyances of rights-of-way under Section 17 by the Department of the Interior constituted a binding administrative interpretation of Section 17, to which the courts should defer. Santa Ana responded that it planned to adduce further factual evidence on that issue, but that Section 17's plain meaning was clear and dispositive. Because the district court agreed, no further factual evidence was placed in the record. At the time, the Bureau of Indian Affairs had contracted to have an eminent historian of the Pueblo Lands Act period, Prof. Lawrence C. Kelly, research the history and implementation of the Act, with particular emphasis on Section 17. The study was completed after the district court decision. Because Petitioner and amici now rely so heavily on the asserted administrative interpretation of Section 17, Santa Ana has lodged this report, entitled, *Section 17 of the Pueblo Lands Act: A Study of Legislative History and Administrative Practice*, and its accompanying exhibits—all documents from public archives—with the Clerk, and served copies on all parties. It is referred to herein as the Kelly Report, and the documents are cited by their exhibit numbers.

⁷ The only evidence on administrative practice before the court of appeals was the number of Section 17 conveyances, the dates for the first and last such conveyances, and deposition exhibits on nine Section 17 rights-of-way at Santa Ana. In its reply brief on appeal, Mountain Bell requested a "limited remand" on the issue of administrative practice, but the court decided that the plain intent of Congress controlled the case.

Status of the Pueblos Prior To The Pueblo Lands Act

Following the accession of the Southwest to the United States by the Treaty of Guadalupe-Hidalgo, 9 Stat. 922 (1848), the first Indian agent for New Mexico (and the first territorial governor), James S. Calhoun, reported that encroachments by non-Indians on Pueblo lands demanded immediate attention. A. Abel, *The Official Correspondence of James S. Calhoun* (Office of Indian Affairs 1915), *passim*.⁸ Calhoun urged that the laws governing trade and intercourse with Indian tribes be immediately extended to New Mexico for the Pueblos' protection. *Id.* In 1850 he was authorized to negotiate a treaty with several Pueblo tribes, including Santa Ana, in which they accepted the trade and intercourse laws and the United States promised to "adjust and settle, in the most practicable manner the boundaries of each Pueblo, which shall never be diminished" *Id.* at 237-246.

The treaty was never submitted to Congress and Calhoun died while enroute to Washington with a delegation of Pueblo leaders to lobby for it. *Id.* at 540. Congress did, however, in 1851, specifically declare the Indian tribes in the Territory of New Mexico subject to the trade and intercourse laws. Act of February 27, 1851, ch. 14, § 7, 9 Stat. 587.

Federal efforts to protect Pueblo property against the non-Indian depredations decried by Calhoun were frustrated by the territorial courts, which held that the Pueblos were not Indian tribes within the scope of federal law.

⁸ This volume was distributed to Committee members during hearings on the Pueblo Lands Act, and excerpts were reprinted. *Hearings on S. 3855 and S. 4223 Before a Subcomm. of the Senate Comm. on Public Lands and Surveys*, 67th Cong., 4th Sess. 18-25, 28-29, 124-131 (1923) (hereinafter, 1923 Senate Hearings).

New Mexico v. Aamodt, 537 F.2d 1102, 1105 (10th Cir. 1976), *cert. denied*, 429 U.S. 1121 (1977). *United States v. Lucero*, 1 N.M. 422 (1869), specifically held that the Non-intercourse Act did not apply to the Pueblos, largely because of judicial notice that they were not really "Indians." *Id.* at 452-453.

Federal officials nonetheless continued efforts to protect Pueblo lands, and in 1876 brought two cases before this Court seeking to overturn the *Lucero* decision and establish that the Pueblos were within the Nonintercourse Act. Instead, the Court embraced *Lucero*, reciting "a few well-considered sentences of the opinion" in that case, and concluding that because of their status the Pueblos were not subject to the trade and intercourse laws. *United States v. Joseph*, 94 U.S. 614 (1877).

Following *Joseph* the Pueblos were increasingly subjected to territorial law and continued to lose possession of their lands.⁹ After *United States v. Mares*, 88 P. 1128 (N.M. 1907), held that the Pueblos' status placed them beyond the federal liquor statutes, Congress declared in the New Mexico Enabling Act of June 20, 1910, ch. 310, § 2, 36 Stat. 557, 558, that "Indian country" "shall also include all lands now owned or occupied by the Pueblo Indians of New Mexico." Congress also required New Mexico to disclaim all right and title to all lands

⁹ See *Nambe v. Romero*, 10 N.M. 58, 61 P. 122 (1900). When Congress created the Court of Private Land Claims, Act of March 3, 1891, c. 539, 26 Stat. 854, allowing for adjudication of land titles arising under Spain and Mexico, the Pueblos were considered ineligible under *Joseph* for legal representation by the government. The Court of Private Land Claims rejected ninety-eight percent of all acreage claimed by the Pueblos in cases filed under that Act. White, Koch, Kelly & McCarthy, *Land Title Study*, 228-234 (New Mexico State Planning Office 1971).

owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the absolute jurisdiction and control of the Congress of the United States.

Id. On the strength of the Enabling Act, the government brought a criminal indictment in 1911 for bringing liquor onto a Pueblo, but the federal district court held the relevant portion of the Act void because of the Pueblos' status under the *Joseph* decision. *United States v. Sandoval*, 198 Fed. Rep. 539 (D.N.M. 1912). This Court reversed. Addressing "the status of the Pueblo Indians and their lands," the Court found that the Pueblos are "Indians in race, customs, and domestic government . . . dependent upon the fostering care and protection of the Government, like reservation Indians in general. . . ." *United States v. Sandoval*, 231 U.S. 28, 38-41 (1913). Congress therefore had full power to legislate for them. The Court attributed the *Joseph* decision's observations respecting the Pueblos to inaccurate information provided by the territorial court. *Id.* at 48-49.

Sandoval technically involved the application of the Indian liquor laws to the Pueblos, but its conclusions about the status of the Pueblos demolished the rationale of the *Joseph* decision and imperiled the titles of thousands of non-Indians who had settled on Pueblo lands. A movement for congressional action on those claims grew after the government surveyed the lands occupied by non-Indians within the Pueblo grants and filed several omnibus ejectment suits in 1919 and 1920.¹⁰ In order to resolve

¹⁰ In a companion suit brought to cancel a 1919 oil and gas lease of the entire Isleta Pueblo reservation, the New Mexico (Continued on following page)

title conflicts created by the belated disapproval of *Joseph*, Congress asserted its power as guardian of the Pueblos, and after considering the problem for four years, in 1924 enacted the Pueblo Lands Act. See Lawrence C. Kelly, *The Assault on Assimilation; John Collier and the Origins of Indian Policy Reform* 163-300 (1983) (hereinafter, *Assault on Assimilation*).

The Pueblo Lands Act

The Pueblo Lands Act asserted the legal rights of the Pueblos to their lands, through the United States, and recognized the equities of non-Indian settlers by means of a federal statute of limitations for adverse possession. *United States v. Wooten*, 40 F.2d 882, 885 (10th Cir. 1930). An administrative body, the Pueblo Lands Board, applied the limitations initially, and unsuccessful title claimants could then plead them in subsequent suits to quiet Pueblo titles. Old deeds were not validated, but rather constituted only color of title for adverse possession. Claims arising after 1902 were cut off completely on the premise that the Enabling Act gave notice that it was impossible to acquire Pueblo lands. H.R. Rep. No. 1748, 67th Cong., 4th Sess. 7 (1923). Other provisions of the Act helped to restore and consolidate Pueblo lands. Sections 1, 3, 6, 8, 14, 16,

(Continued from previous page)

district court rejected defendant's challenge to federal authority over Isleta's lands and cancelled the lease, holding that the Pueblo could not convey because "the Enabling Act gives Congress absolute jurisdiction and control over the disposal of the lands of the Pueblo Indians," *United States v. Campbell*, No. 709 Equity (D.N.M. Orders filed November 17, 1921 and March 6, 1923). See 1923 Senate Hearings at 155. The United States was represented in the case by Ralph Emerson Twitchell, one of the major architects of the Pueblo Lands Act. Not until the decision in *United States v. Candelaria*, 271 U.S. 432 (1926) was it definitely established that Pueblo lands were inalienable prior to passage of the Enabling Act.

19. When the Act's implementation led to charges of unfairness to the Pueblos, Congress amended it extensively. Act of May 31, 1933, ch. 45, 48 Stat. 108.

Conveyances Under Section 17

Prior to and following the Pueblo Lands Act, the Department of the Interior believed the general right-of-way statutes for Indian lands applied to the Pueblos and it granted rights-of-way across Pueblo land in accordance with them. (J.A. 71-72; Kelly Report, p. 21.) A review of the information provided to Congress in the 1923 hearings on the Pueblo Lands Act shows that Congress likewise believed these generally applicable Indian statutes included the Pueblos. 1923 Senate Hearings, *supra*, n. 8, at 72-75, 154-155; *Hearings on H.R. 13452 and H.R. 13674 Before the House of Rep. Comm. on Indian Affairs*, 67th Cong., 4th Sess. 40-41 (1923) (hereinafter, 1923 House Hearings). Consequently, rights-of-way were not addressed by the Act. The government attorney detailed to conduct the quiet title suits under the Act decided, however, that the general right-of-way statutes did not apply to Pueblo land, and in one of the first quiet title suits to be brought under the Pueblo Lands Act he sued a company that had a right-of-way granted pursuant to the general statutes. The defendant company was seeking refinancing from Chicago bond houses at the time, and its attorneys pressured local federal officials to acquiesce in an interpretation of Section 17 in which the last clause of the section would be taken to mean that interests in Pueblo lands could be conveyed if the Secretary of the Interior approved. Kelly Report, *supra*, n.6, pp. 20-26.

The first use of Section 17 for this purpose did not occur until April, 1926, nearly two years after the Act

was passed, and shortly before the decision in *United States v. Candelaria*, 271 U.S. 432 (1926). (J.A. 188.) The great majority of the 79 rights-of-way approved under Section 17 were issued in the brief period between 1926 and 1933. Petitioner itself acquired 26 easements under Section 17, one third of the total. App. 1-2. There have been no conveyances relying on Section 17 since 1959. See Kelly Report, pp. 38-39.

The Mountain Bell Right-of-Way

Mountain Bell's predecessor constructed a telephone line, the Denver-El Paso Toll Line, across Santa Ana's "El Ranchito" tract in about 1905, without consent from the Pueblo or the United States or payment of consideration.¹¹ The company was joined as a defendant in *United States v. Brown*, No. 1814 Equity (D.N.M. May 31, 1929) (the quiet title suit filed on behalf of Santa Ana under the Pueblo Lands Act), but it never answered or appeared in the case. Instead it went directly to the Pueblo and obtained the Tribal Council's consent for an easement for which it paid \$101.60. The Pueblo received no compensation for the 23 years of trespass. (J.A. 38-43.)¹² The

¹¹ Mountain Bell, for the first time in this litigation, asserts in its brief that it obtained a right-of-way from Santa Ana in 1905 whose validity was later "cast in doubt." Pet. Br. at 3, and n. 1. In response to a request for admissions, however, Mountain Bell conceded that it could not produce "any document to establish conclusively that it or a predecessor in interest obtained a right-of-way across Santa Ana lands from the Santa Ana Pueblo or the Department of the Interior in the period 1900-1926 . . ." This response, apparently inadvertently omitted from the Joint Appendix, is set forth at App. 8-9. A letter produced by Mountain Bell in discovery, reproduced at App. 10 (responding to the letter reproduced at J.A. 71-72), indicated that in 1928 the company had not realized this portion of its line was on Indian land at all.

agreement was submitted to the Secretary for approval under Section 17. When the United States attorney learned that the easement had been approved, he promptly dismissed Mountain Bell from *U.S. v. Brown*. (J.A. 66-68.)

SUMMARY OF ARGUMENT

It is a truism of federal Indian law that understanding "requires more than textual exegesis." Felix Cohen, *Handbook of Federal Indian Law* (1942 ed.) at xxxii. The purpose and effect of Section 17 of the Pueblo Lands Act can only be discerned from an understanding of the overall purpose of that Act, seen against the distinctive historical and legal background of the Pueblo Indians. The fundamental flaw in Petitioner's argument, that Section 17 may be viewed as a broad grant of authority for conveyances, is that it ignores the context. It isolates a single clause of a complex statute, and converts it into an independent and extraordinary grant of authority that subverts the purpose of the entire Act. And the only justification for this approach is a strained comparison with a sentence from the Nonintercourse Act.

The meaning of Section 17 becomes clear when read in context as Congress' declaratory underscoring of this Court's landmark decision in *United States v. Sandoval*, 231 U.S. 28 (1913). Section 17 was a broadly phrased proclamation in an otherwise refined statute that quieted Pueblo titles and created assiduously limited provisions for acquiring title to Pueblo lands. Interpreting Section

¹² Although Petitioner insists that Santa Ana understood and agreed that under Section 17 such a conveyance was valid if approved by the Secretary, given that none of the Pueblo's officers could even sign his name (the original of the easement shows that they thumbprinted it), it is doubtful that the Pueblo had any notion of these subtle legalisms. Cf. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-631 (1970).

17 as a grant of power to alienate Pueblo lands distorts the language of the section, conflicts enormously with the design of the Act, and perforce causes absurd consequences. Petitioner's interpretation is, moreover, a radical departure from established legal principles and other statutes governing Indian land transactions, which are explicit and limit administrative discretion. The revisionist interpretation of Section 17 as authority to convey, was not contemporaneous and was reluctantly adopted only as an accommodation of private interests who wanted Indian lands without having to comply with the strict rule of law. Conveyances under Section 17 were clustered within a short time frame and manifest a disharmonious application. Deference to the interpretation is inappropriate. Finally, the very few Section 17 lines involved in quiet title suits under the Act were dismissed with the intent of circumventing those suits. That the order of dismissal at issue herein was not on the merits is illustrated by the later ruling of the court that the Pueblo Lands Act conferred no jurisdiction over rights-of-way. *Res judicata* has no application.

ARGUMENT

I. SECTION 17 OF THE PUEBLO LANDS ACT WAS A REAFFIRMATION OF THE FEDERAL GUARDIANSHIP OVER PUEBLO LANDS, NOT A GRANT OF POWER TO CONVEY THOSE LANDS.

Section 17 of the Pueblo Lands Act can only be understood in context. We begin, thus, by setting out the statutory context, and showing how other provisions of the Pueblo Lands Act, its history, and Congress' manifest purpose, to reestablish full federal guardianship over the Pueblos and their lands, utterly refute the interpretation

of Section 17 asserted by Petitioner. We next examine the history and language of Section 17 itself, explaining its primarily declaratory purpose and meaning, discuss the illogic of Petitioner's analysis of the language, and show the absurd consequences that flow from that analysis. We then consider the hopeless conflicts between Section 17 as portrayed by Petitioner and Congress' consistent practice respecting conveyances of Indian lands. Finally, we explain how the asserted administrative record of Section 17's use to validate conveyances of Pueblos' lands is entitled, under numerous decisions of this Court, to no deference here.

A. The Pueblo Lands Act and its legislative history manifest Congress' intention to prevent future losses of Pueblo lands, not facilitate them.

The central issue in this case is whether Congress intended, by the second clause of Section 17 of the Pueblo Lands Act, to give the nineteen Pueblo tribes a power possessed by no other Indian tribe—the power to alienate their lands freely, subject only to the approval of the Secretary of the Interior. An examination of the Act's overall purposes compels the conclusion that Congress had no intention to grant any such power in that provision.

A statute cannot be interpreted from isolated clauses, but must be construed as a whole, as part of an "overall legislative plan." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412 (1968). As this Court said in *Richards v. United States*, 369 U.S. 1, 11 (1962):

We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, "we must not be guided by a single sentence or member of a sentence, but [should]

look to the provisions of the whole law, and to its object and policy.”

(quoting from *United States v. Boisdore's Heirs*, 49 U.S. (8 How.) 113, 122 (1850)).

The Pueblo Lands Act was an express act of guardianship, predicated upon and ratifying this Court's decision in *United States v. Sandoval*, 231 U.S. 28 (1913), which reversed years of erroneous treatment of the Pueblos as not Indians. See, *United States v. Chavez*, 290 U.S. 357, 361, 362 (1933). The Act's stated purpose was to quiet the titles of the Pueblo Indian tribes, through the United States as guardian, and it recognized the government's liability for past failures to protect Pueblo property. Additionally, the Act set up a means for consolidating Pueblo lands (Sections 8, 16), preserved grant overlaps for the Pueblos (Section 14), and required the purchase of replacement lands and water rights (Section 19). Section 17, like Section 1, affirmed the guardianship of the United States. *United States v. Univ. of New Mexico*, 731 F.2d 703, 706 (10th Cir. 1984), *cert. denied*, — U.S. — (1984).

For non-Indians the legislation was “an act of grace,” *Garcia v. United States*, 43 F.2d 873, 878 (10th Cir. 1930), which afforded a strictly defined and limited class of non-Indians who had occupied Pueblo lands but had acquired no rights, a one-time opportunity to obtain title, according to exacting terms that were long-debated and painstakingly defined. Section 17 must be construed in light of these limited means of transferring Pueblo titles. Section 4 specifies federal limitations provisions in positive, express language: “all persons claiming title to, or ownership of [Pueblo lands] may . . . plead limitation of action as follows. . . .” The criteria, adverse possession with color of title since 1902, or without color of title since 1889,

coupled with payment of taxes, were to be applied preliminarily by an administrative board in making a report on each Pueblo's lands. Claimants found not to have met the criteria were joined as defendants in the suits to quiet Pueblo title that followed the Board's reports, in which they were allowed to plead the limitations directly.

Under Section 13, a Board finding that a claimant met one of the limitations provisions, was followed by the filing of field notes and plats by the Secretary, which constituted “conclusive evidence of the extinguishment” of Pueblo title to such lands. Subsequently, a patent or certificate of title would issue having the “effect of a relinquishment by the United States of America and the said Indians.” Claimants who proved they satisfied the Section 4 criteria in the quiet title suits were, under Section 5, entitled to a decree having the “effect of a deed of quitclaim” from the United States and the Indians.

Both of these methods of conveying Pueblo titles are explicit, limited, and non-discretionary. They apply clear-cut rules of law contained in a federal adverse possession statute. Claims originating after 1902 were cut off totally. Broad, discretionary power to convey Pueblo lands outside these detailed procedures conflicts egregiously with this conscious design. See 1923 Senate Hearings at 161, 164-166, 184; 1923 House Hearings at 46-47, 149, 272-278.

Congress supplied but one other method in the Act by which non-Indians could acquire Pueblo land, in Section 16, whose wording and legislative history demonstrate Congress' purpose in the Act to prevent further losses of Pueblo land. Section 16 disproves Petitioner's interpretation, for if Section 17 is construed to be the grant of authority contended for, then Section 16 is superfluous. See *Bernier v. Bernier*, 147 U.S. 242, 246 (1893).

The language of Section 16 is narrow, affirmative, and unambiguous, in contrast to the broadly prohibitive purport of Section 17:

Sec. 16. That if any land adjudged by the court or said lands board against any claimant be situate among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian land, and the Secretary of the Interior deems it to be for the best interest of the Indians that such parcels so adjudged against the non-Indian claimant be sold, he may, with the consent of the governing authorities of the Pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash. . . .

Section 16 first appeared in the Bursum Bill of 1922, S. 3855, 67th Cong., 2d Sess., App. 32, and, although restrictive, was vehemently opposed by the Pueblos and the Indian rights organizations, who feared that it could lead to further losses of Pueblo land. See, *Assault on Assimilation*, 211-254. That section was, therefore, subjected to careful congressional scrutiny and revision. 1923 Senate Hearings, at 105-106, 154-155. Contrary to the implication in the United States Brief, at 17, the colloquy at pp. 154-155 of the 1923 hearings, pertained to Section 16, not Section 17, which had not yet been proposed. Senator Lenroot asked whether there were any circumstances where it would be in the interest of the Indians that their land be sold. The answer, offered by Senator Jones, was yes, in one instance, where strips of unextinguished Pueblo land are left isolated or interspersed among lands awarded to non-Indians. 1923 Senate Hearings at 154. It was these strips that Senator Lenroot suggested should "be sold or alienated with the consent of both the Pueblo and the Secretary of the Interior," *id.* at 155, leading to what became Section 16 of the Act, which authorized the Secre-

tary to sell these remote tracts under promulgated regulations, with Pueblo consent, and only when deemed in the best interest of the Indians. Significantly, as the Senate colloquy indicates, this is the sole circumstance in which Congress saw any need to authorize the sale of Pueblo land.¹³

It is absurd to suppose that Congress, after deliberately tightening the conditions imposed by Section 16, suddenly repealed those restrictions by granting the Pueblos unconditioned power to alienate their lands, subject only to the signature of the Secretary or a delegated subordinate. Such irrational results obviously cannot be imputed to Congress.

It is thus ironic that Petitioner justifies its interpretation primarily on the ground that it saves the second clause of Section 17 from meaninglessness. Pet.Br. at 12, 18. Significance should, if possible, be accorded all parts of a statute, but converting the second clause of Section 17 into a grant of authority renders *all* of Section 16 a nullity.

By enacting the Pueblo Lands Act, Congress sought to rectify the damage created by this Court's disavowed decision in *Joseph*. Over the course of four years, Congress carefully refined legislation employing restrictive and positively stated terms in fulfillment of its professed

¹³ Congressional intent to use Section 16 as the sole means of selling Pueblo land is established more clearly by the fact that in 1933 Congress amended and broadened the section to allow sale of any land adjudged against any private claimant, but leaving in place all of the other conditions. Act of May 31, 1933, ch. 45, §7, 48 Stat. 111. This amendment would obviously have been an "anomaly," U.S. Br. at 17, n.8, if Section 17 had the meaning argued for by Petitioner. There is no evidence that Congress was made aware in the slightest that Section 17 had been construed to consume Section 16. See App. 37-38.

role as guardian of the Pueblos. There is no evidence whatever to indicate that Congress intended to resurrect *Joseph* or relieve the Pueblos of the guardianship so clearly enunciated by *Sandoval*, as is contended by Petitioner and *amici* AT&SF and State of New Mexico. In view of the purpose and structure of the Pueblo Lands Act, it is anomalous to conclude that Congress intended the broadly prohibitive terms of Section 17 as authority to alienate Pueblo lands.

B. Section 17 was intended by Congress to ratify the implications of *Sandoval* and reaffirm the status quo reflected in the Enabling Act and the Nonintercourse Act.

The meaning of Section 17 must be determined by the intent of Congress. The language of Section 17 originated outside the government and was added expeditiously to what became the final bill in February, 1924. Kelly Report, *supra*, n. 6, pp. 10-12, Exs. 1-11. It was drafted by Francis Wilson (a Santa Fe attorney for one of the Indian rights organizations lobbying for the bill), who described it as

the shortest way to prevent existing conditions from recurring or existing again. . . . This section is intended to cover the same ground as Section 2116 of the Revised Statutes [the Nonintercourse Act] but it is changed so as to accord with the conditions of the Pueblo Indians.

Kelly Ex. 7. Almost alone among other provisions of the bill, the language of Section 17 was undiscussed, undisputed, and unamended.¹⁴ Kelly Report, pp. 13-14.

¹⁴ Indian Commissioner Burke expressed concern to Wilson that proposing the three new sections Wilson had drafted (in-

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Section 17 reads, in a single sentence,

No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto, made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of Interior.

By its own terms Section 17 contains no authority for the conveyance or alienation of interests in Pueblo lands, nor does it purport to modify or remove any existing restrictions. The negative language simply adds to restraints already in effect ("No right, title or interest shall . . . be acquired . . . and no sale, grant, lease . . . shall be of any validity . . ."). The two clauses logically are cumulative, read literally, connected by the conjunction "and." The first clause by its terms prohibits any transfer of title to Pueblo lands, whether with Pueblo concurrence or not, "except as may hereafter be provided by Congress."¹⁵ It

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cluding Section 17) so late might cause Congress to think something was being put over on them. Kelly Exs. 5, 6. That Section 17, alone among the three new sections, was proposed and accepted, indicates that Congress did not view the section as raising any new concerns. That most certainly would not have been true had the section been meant as broad authority for conveyances. Cf. Kelly Report, *supra*, n. 6, p. 14.

¹⁵ This construction is supported by the only other congressional reference to Section 17, which restated the section without the comma separating the two clauses, indicating that the section was understood to have a unified meaning. S. Rep.

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is plainly this clause that Wilson drafted "to accord with the condition of the Pueblo Indians": it specifically precludes any further losses of Pueblo lands as had happened in the past, by deeds, adverse possession under New Mexico law, or otherwise. The second clause deals only with conveyances of Pueblo lands, and as has been noted, Pet. Br. at 29; U.S. Br. at 15, its structure resembles that of the first sentence of 25 U.S.C. §177 (the Nonintercourse Act). Petitioner and *amici*, however, urge that the substitution of the Secretary for Congress in that structure transforms this clause from a declaration of principle to a broad delegation of Congress' power over conveyances of Pueblo land to the Secretary. As is discussed elsewhere, *supra* at 14-18, *infra* at 24-32, that construction finds no support anywhere in the legislative history or purpose of the Act, the structure of the section, or Congress' normal practice in overseeing conveyances of Indian land.

The more sensible interpretation of the second clause is that it merely references the numerous statutes—such as the various right-of-way statutes enacted near the turn of the century, 25 U.S.C. §§311-321, the leasing statutes, 25 U.S.C. §§ 393, 396, 397, 398, and the timber sales statute, 25 U.S.C. § 407—by which Congress had modified the Nonintercourse Act so as to permit certain types of conveyances of Indian land under Secretarial supervision. Wilson

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No. 492, 68th Cong., 1st Sess. (1924) at 11; Kelly Report p. 13. Petitioner views the comma separating the two clauses as the equivalent of a period, in effect making the section into two sentences. Pet.Br. at 17. See *United States v. Palmer*, 16 U.S. (3 Wheat.) 610, 636 (1818) (Johnson, J., concurring). The first clause controls the section.

The Solicitor General claims that the term "acquired" refers to actions by others to obtain interests in Pueblo lands without Pueblo consent. U.S. Br. at 14, and see Pet. Br. at 19. This is contrary to common usage. "Acquisitions" of property typically involve sales. See, e.g., *Black's Law Dictionary* (5th ed. 1979) at 23.

plainly was aware of these statutes, since at the time the Interior Department was approving leases and rights-of-way on Pueblo lands under them, a fact made known to Congress during hearings on the Act. Thus understood, the second clause of Section 17 merely recites that conveyances of Pueblo lands must have Secretarial approval *where Congress has authorized the Secretary to approve conveyances*—an updated reaffirmation of the full applicability of the Nonintercourse Act as it stood in 1924.¹⁶

Section 17 is thus correctly viewed as simply a declaratory reaffirmation of the law as it stood at the time. *Bryan v. Itasca County*, 426 U.S. 373, 391 (1976). Almost thirty years ago the court of appeals examined Section 17 in *Alonzo v. United States*, 249 F.2d 189, 195 (10th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958)¹⁷, concluding that it insured that restrictions implicit in the decision in *United States v. Sandoval* . . . would continue in force.

Rejecting the argument that the New Mexico Enabling Act modified the Nonintercourse Act, the court added that even if such were the case, the restrictions of the Nonintercourse Act "were clearly reimposed by §17 of the Act

¹⁶ Similarly, the reference to sales by individual Pueblo members may well have been intended as a reference to the possibility of allotment, which was still, in 1924, an aspect of federal Indian policy. Allottees could sell their allotments under existing statutes, with Secretarial approval. 25 U.S.C. §349.

¹⁷ The 10th Circuit panel in *Alonzo* consisted of the author of the opinion below herein, Hon. Jean Breitenstein; Chief Judge Sam G. Bratton, a former United States Senator from New Mexico and Senate sponsor of the 1928 Pueblo right-of-way act, 25 U.S.C. §322, and the 1933 amendments to the Pueblo Lands Act, Act of May 31, 1933, ch. 45, 48 Stat. 108; and former Chief Judge Orie Phillips, who was one of the two federal district court judges who heard the suits to quiet title under the Pueblo Lands Act, and who, upon his elevation to the court of appeals in 1929, heard many of the appeals under the Act.

of 1924." *Id.* at 196. The uniquely experienced panel in that case plainly viewed Section 17 as an affirmation of the Nonintercourse Act, the Enabling Act, *Sandoval*, and *Candelaria*, and not as in any way departing from them.¹⁸

The view of Section 17 as an affirmation of existing law was presented to this Court by the Solicitor General in the *Candelaria* case, a little over a year after the Act was passed. After discussing *Sandoval* and the Enabling Act, the government noted the Pueblo Lands Act and emphasized Section 17 as being especially exemplary of the federal guardianship over Pueblo lands. Brief for the United States at 10-11 (Kelly Ex. 18). With Section 17 squarely presented to it, this Court ruled in *Candelaria* that the Nonintercourse Act applied fully to the Pueblos and had since 1851. *Candelaria*, 271 U.S. at 441-42. The opinion did not view Section 17 as supplanting or superseding the Nonintercourse Act, as Petitioner would now have the Court rule.¹⁹

¹⁸ Felix Cohen called Section 17 "the final step . . . in assimilating pueblo lands to the status of other tribal lands." Cohen, *Handbook of Federal Indian Law* 390 (U.N.M. reprint of 1942 ed.). The most recent edition of Cohen's treatise calls Section 17 a specifically targeted supplement to the general restraint on alienation of the Nonintercourse Act. Cohen (1982 ed.) at 516, n. 47. A recent commentary on Pueblo water rights describes Section 17 as assuring that "no interest in [Pueblo] lands could thereafter be acquired without congressional approval." *Pueblo Water Rights*, *supra*, n. 5, at 57.

¹⁹ Numerous cases since *Candelaria* have reiterated that the Pueblos are and always have been fully within the embrace of the Nonintercourse Act, contrary to the assertion of *amicus* PNM. PNM Br. at 3, n. 2. *Pueblo of Santa Rosa v. Fall*, 273 U.S.

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Viewing Section 17 as generally declaratory accords with historic practice. *Bryan*, 426 U.S. at 391-392. The Nonintercourse Act is itself declaratory and largely redundant. In *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 604 (1823), Justice Marshall took note of the various laws prohibiting purchases from the Indians, which were technically unnecessary because the Indians did not hold fee title, and described those laws as declarations of national policy. *Cf. Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978), *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667-670 (1974). Similarly, this Court has viewed disclaimer clauses in state enabling acts as affirming existing law and preserving the status quo. *Arizona v. San Carlos Apache Tribe*, 103 S.Ct. 3201, 3211-3212 (1983); *Three Affiliated Tribes v. Wold Engineering*, 104 S.Ct. 2267, 2275 (1984). Placed in the context of the Nonintercourse Act and the New Mexico Enabling Act, Section 17 is most comprehensible if viewed as preserving the status quo represented by those statutes and the *Sandoval* decision.

As shown by the final committee reports on the bill, Congress legislated on the basis of the conclusion, later affirmed by this Court, that the Pueblos were "not competent" to alienate their property. H.R. Rep. No. 787, 68th Cong., 1st Sess. 2-4 (1924); S. Rep. No. 492, 68th Cong.,

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315, 320 (1927); *United States v. Chavez*, 290 U.S. 357, 363-364 (1933); *United States v. Board of National Missions*, 37 F.2d 272, 274 (10th Cir. 1929); *Garcia v. United States*, 43 F.2d 873, 878 (10th Cir. 1930); *Alonzo v. United States*, 249 F.2d 189, 194-196 (10th Cir. 1957), cert. denied, 355 U.S. 940 (1958); *New Mexico v. Aamodt*, 537 F.2d 1102, 1109 (10th Cir. 1976) cert. denied, 429 U.S. 1121 (1977); *Plains Elec. Gen. & Trans. Co-op v. Pueblo of Laguna*, 542 F.2d 1375, 1376 (10th Cir. 1976); *United States v. University of New Mexico*, 731 F.2d 703, 706 (10th Cir. 1984), cert. denied, — U.S. — (1984).

1st Sess. 3, 4 (1924).²⁰ Section 17 was primarily intended to reiterate that principle.

This Court has already described the intent of the Pueblo Lands Act as an assertion of guardianship over the Pueblo tribes. *United States v. Chavez*, 290 U.S. 357, 362 (1933). Restriction on alienation is the essential feature of that guardianship. *United States v. Mitchell*, 445 U.S. 535, 542-544 (1980). Viewing the Pueblo Lands Act "in light of common notions of the day," *Oliphant*, 435 U.S. at 206, guardianship implied that the Pueblos were wards, were *non sui juris*, and were not competent to convey their lands. (J.A. 19, ¶ 4.) By declaring its guardianship over the Pueblos, Congress intended to assert its power and consolidate its control over the Pueblos and their lands, not to relieve or emancipate them. *Cf.*, *United States v. Waller*, 243 U.S. 452, 459-60 (1917).

C. Petitioner's interpretation of Section 17 is convoluted, creates redundancies, and leads to anomalous consequences, all in defiance of common sense explanation.

Notwithstanding the evident purpose of Section 17, in both its literal meaning and in the context of the Act, Petitioner seeks to transform it into a vast transfer of power over Pueblo lands. Joined by *amici*, Petitioner urges that if the first clause is confined to involuntary loss of Pueblo land, the second clause stands out as a grant of unqualified power to the Pueblos to convey their lands voluntarily,

²⁰ That the Pueblos were understood, after *Sandoval*, not to have any power to alienate their lands was repeatedly pointed out during the Committee hearings. App. 11-31. And see, H.R. Rep. No. 787, 68th Cong., 1st Sess. 2-4 (1924); H.R. Rep. No. 1748, 67th Cong., 4th Sess. 7 (1923). Nowhere did Congress indicate an intention to restore the Pueblos to their assumed pre-*Sandoval* status, as Petitioner would have this Court do now, and as *amicus* State of New Mexico urges was intended. N.M. Br. at 5-7. And see AT&SF Br. at 13, n.10.

with the approval of the Secretary (a function that can be delegated to low-level bureaucrats, *Bailey v. Bannister*, 200 F.2d 687 (10th Cir. 1952)). But that argument is merely tautological: the inference that the first clause must be limited in its application solely to involuntary losses derives entirely from the reference in the second clause to conveyances. Petitioner would have the meaning of the second clause depend upon a change in meaning of the first clause which, in turn, is inferred from the second clause. Because the first clause covers all transfers of interests without qualification, its meaning cannot be changed by inference, and such tautological reasoning, in any event, must fail.

Petitioner's argument is largely exegesis on Section 17's internal structure and word-for-word comparison with one sentence of the Nonintercourse Act. The imputation of the word "involuntary" to the first clause creates the very problems Petitioner claims to resolve. If the first clause was only intended to exclude state law, then the phrase "or in any other manner except as may hereafter be provided by Congress" is superfluous. Pet. Br. at 24. The whole clause would be rendered superfluous, anyway, because the Enabling Act had already accomplished that goal. If the first clause is also taken to address congressionally authorized losses, then it is a redundant declaration that Congress shall not act until Congress acts. Section 17 thus makes sense only if taken as Congress intended, as express confirmatory notice of the trust status of the Pueblos' lands.²¹ That fact and the expeditious in-

²¹ Additionally, the words "or any title or claim thereto" in the second clause are probably meaningless under any interpretation of Section 17, unless the word "of" be imputed to make it parallel to the Nonintercourse Act, or unless the phrase

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corporation of the Section into the final bill evince a broadly declaratory purpose for Section 17, not a mechanism for future administration of Pueblo lands.

Seeking some support for their interpretation, Petitioner and the Solicitor General seize on Francis Wilson's statement, Kelly Ex. 7, that in drafting Section 17 he "changed" the Nonintercourse Act "to accord with the conditions of the Pueblo Indians." They argue that the "change" referred to was a radical delegation to the Secretary, in the second clause of the section, of the totality of Congress' power to regulate conveyances of Pueblo lands. Pet. Br. at 28-30; U.S. Br. at 19. This baseless contention overlooks the obvious. It is the *first* clause, which has no parallel in the Nonintercourse Act but which addresses specifically the unhappy past experience of the Pueblos, that Wilson noted as his alteration of the Nonintercourse Act. See discussion *supra* at 19-21.

Petitioner's interpretation could have subverted the entire scheme of the Pueblo Lands Act, and it was so used to vitalize certain claims based on old deeds from the Pueblos. All such deeds, made without congressional authority, were void. *Pueblo of Santa Rosa v. Fall*, 273 U.S. 315, 320 (1927); *Franklin v. Lynch*, 233 U.S. 269, 271-273 (1914). Nonetheless, deeds from the Pueblos of Laguna and Acoma to the Atchison, Topeka and Santa Fe Railroad (and its predecessor) between 1880 and 1922 were simply submitted to the Secretary for approval under Section 17. Kelly Report, pp. 39-41, Exs. 101-106. The railroad thus escaped defending its titles in accordance with

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is construed to relate back to the first clause. U.S.Br. at 12-13. Most likely this phrase is simply evidence of the carelessness with which Section 17 was drafted, and therefore also evidence of an admonitory and less substantive objective.

the Act, and the Pueblos received no compensation for the lands lost. It is certain Congress never intended that Section 17 paralyze the remainder of the Act's provisions.

Petitioner's interpretation of Section 17 further raises serious questions about Congress' action in 1928, definitely applying the general Indian right-of-way statutes to Pueblo lands. 25 U.S.C. § 322.²² If rights-of-way could be conveyed under Section 17, one would expect that fact at least to be mentioned in the legislative history, if not the language of the 1928 Act, yet Congress acted on the understanding that there was then no authority for rights-of-way over Pueblo lands, and that Act was intended to comprehensively cover the field. *Plains Elec. Gen. & Trans. Co-op v. Pueblo of Laguna*, 542 F.2d 1375, 1378-1379 (10th Cir. 1976). Similarly, in 1968 Congress amended 25 U.S.C. § 415, to permit leases of lands of Cochiti, Pojoaque, Tesuque and Zuni Pueblos for up to 99 years. Pub.L. 90-570, 82 Stat. 1003. Such legislation would have been totally unnecessary if Section 17 has the meaning asserted here, for it would permit leases of unlimited duration, or outright sales.²³

²² During consideration of the Pueblo Lands Act, Congress was informed that the general Indian right-of-way and leasing statutes applied to Pueblo lands, 1923 Senate Hearings at 72-75; 154-155; 1923 House Hearings at 40-41, and it referenced those statutes in Section 17 of the Act. See discussion *supra*, at 20. It was the government attorney handling the quiet title suits who decided (perhaps wrongly; see *F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99, 111 (1960), and *id.* at 127-128 (Black, J., dissenting)) that those statutes did not apply, leading Congress to think new authority was needed. Kelly Report, pp. 20-22.

²³ The United States inconsistently contends that while Section 17 should be interpreted as authority for conveyances, the conveyances permitted ought to be limited to rights-of-way since that is the extent of the administrative practice and as-

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Petitioner's construction of Section 17 as positive authority (rather than a reference to such authority as then existed) would necessarily embrace conveyances of Pueblo lands "made by . . . any Pueblo Indian living in a community of Pueblo Indians," yet Pueblo lands, like other tribal lands are held communally.²⁴ Individual Indians have no vendible or undivided interest in Pueblo lands and cannot convey what they do not own. *Franklin v. Lynch*, 233 U.S. 269, 271 (1914). Petitioner's reasoning thus either gives Section 17 a superfluous meaning or leads to a ridiculous implication of authority for allotment to individuals, which the Pueblo Lands Act most certainly did not effectuate.

D. Interpreting Section 17 as authority for conveyances would be contrary to Congress' consistent practice with respect to conveyances of Indian tribal lands.

Petitioner's interpretation would constitute a major exception to—not a reaffirmation of—the Nonintercourse Act and all other federal statutes governing conveyances of interests in tribal lands, and would make Pueblo lands,

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serted congressional "ratification". U.S. Br. at 26-27. That no "ratification" of this interpretation can be imputed to Congress' subsequent actions is shown *infra*, at 38, n. 35. And the administrative practice included resort to Section 17 to approve outright sales of Pueblo land. Kelly Report, pp. 41-44. Regardless, either Congress intended the section to permit conveyances of all types or it did not. The United States seems to admit that Congress did not intend it as such authority, and merely asks the Court to excuse Section 17's use to validate rights-of-way.

²⁴ Petitioner accepts this conclusion and even argues that individuals can convey. Pet.Br. at 25, n.18.

alone among the lands of all other Indian tribes, completely marketable.²⁵

Statutes must be construed in conformity with the well settled policy of the government, but Petitioner's interpretation contravenes several established policies: it results in abdication by Congress of its own historic authority over Indian land transactions without express language to that effect, *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649 (1976); *Chippewa Indians v. United States*, 307 U.S. 1, 5 (1939), and gives the Secretary of the Interior unprecedented discretion to approve sales of tribal lands.

As this Court said in *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 75, 86 (1976) (quoting Cohen (1941 ed.), at 94, 97), control by Congress of tribal lands has been "one of the most fundamental expressions, if not the major expression, of the constitutional power of Congress over Indian affairs . . ." And see *Weeks* at 83. In-

²⁵ There is no inconsistency in the Pueblos wanting to insure the applicability to their lands of the full array of federal restrictions on alienation. Like other tribes, the Pueblos as communities take the long view in wanting to preserve their homelands. Bitter experience prior to the Pueblo Lands Act, and even more recently, see, e.g., Reid P. Chambers and Monroe Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 Stanford L.Rev. 1061 (1974), has shown that tribal councils can be induced to agree to unwise conveyances. A single such transaction could cause the total loss of the land base, and the ultimate disappearance of the tribal entity. Reposing an unconditioned, delegable power of approval in the Secretary, moreover, may not provide adequate protection against improvident transactions. *Id.*, and see, Kelly Report at 24, and Ex. 39, p. 4. That was particularly true in 1924. Albert Fall, who had resigned as Secretary in 1923, had been notorious for his efforts to open Indian lands to miners and other non-Indian developers. *Assault on Assimilation* at 152-159. Characteristically, it is non-Indian entities such as Petitioner and amici who argue for "emancipation" of the Pueblos.

cluded in that power is the exclusive right to extinguish Indian property rights. *Ibid.*; *United States v. Santa Fe Pac. Ry Co.*, 314 U.S. 339, 347 (1941); *Solem v. Bartlett*, 104 S.Ct. 1161, 1166 (1984).

Unless Congress itself clearly expresses a contrary intent, Indian legislation must be read to reserve Congress' authority. *Hollowbreast*, 425 U.S. at 656. The policy of restricting conveyances of tribal land is based upon a judgment "that such purchases are opposed by the soundest principles of wisdom and national policy." *Johnson v. McIntosh*, 21 U.S. at 543, 604. A matter of such national importance cannot be deemed to have been delegated without express statement of Congress,²⁶ yet nowhere in Section 17 is there language even suggestive of a conferral of authority, let alone the direct language characteristic of a grant of such power. *See Southern Pacific Transportation Co. v. Watt*, 700 F.2d 550, 554 (9th Cir. 1983), *cert. denied*, 104 S.Ct. 393 (1983). If Congress had intended to confer broad discretionary authority to approve sales of Pueblo lands it would have been straightforward in doing so. *Bryan*, 426 U.S. at 390; *Aamodt*, 537 F.2d at 1111.²⁷

²⁶ This high standard has not, however, been so true of individual Indian allotments issued under the General Allotment Act, Act of Feb. 18, 1887, c. 119, 24 Stat. 388, and similar Acts and treaties, the purpose of which were ultimately to wean allottees away from their tribal origins and assimilate them into the mainstream culture. Alienation of allotments is relatively easy. *See, e.g.*, 25 U.S.C. §§ 349, 372. For that reason, cases such as *Pickering v. Lomax*, 145 U.S. 310 (1892), relied on by Petitioner, devoid of context, are of no relevance here.

²⁷ The argument that in the second clause of Section 17 Congress deliberately aped the Nonintercourse Act's language, merely substituting the Secretary for Congress as the authorizing entity, Pet.Br. at 29-31, U.S.Br. at 15-16, fails for just that reason. There is a vast difference between Congress saying that Indian land may not be alienated until it (Congress) acts, and Congress delegating its entire power in that regard to the Secretary. So profound a transfer of power would certainly have been announced more clearly.

Significantly, other statutes granting authority for alienation consistently authorize only grants of limited interests in Indian lands, for designated purposes.²⁸ Section 17 contains no limitations at all—if construed as a grant of power, it would allow complete alienation of Pueblo lands, hypothetically all Pueblo lands, without restriction, for any reason. *See Plains Electric Generation and Transmission Cooperative v. Pueblo of Laguna*, 542 F.2d 1375, 1381 (10th Cir. 1976).

Congress has, moreover, invariably included in statutes authorizing conveyances of interests in tribal lands detailed conditions, or provision for issuance of regulations to govern such conveyances. *See, e.g.*, 25 U.S.C. §§ 312, 319, 321, 323, 396b. It did just that in Section 16 of the Pueblo Lands Act. This practice has a protective purpose, and is imposed by Congress even on minor transactions, yet Section 17 is devoid of such protective language and sets no restraints on the tribes or the Secretary. There is not even any requirement that the Pueblos receive reasonable compensation for conveyances. In this regard, it is significant that Section 17 was never codified in Title 25 of the United States Code, as one would expect if it had the operative significance attributed it by Petitioner.

The Pueblo Lands Act must be construed in light of the "undisputed existence of a general trust relationship" that "has long dominated the Government's dealings with Indians," *United States v. Mitchell*, 103 S.Ct. 2961, 2972 (1983). That relationship, clearly reaffirmed in the Act,

²⁸ They also use clear, express language delegating the power to convey. *See, e.g.*, 25 U.S.C. § 311: "The Secretary . . . is authorized to grant permission" for public highways. Similar language is found throughout the sections of Title 25 dealing with conveyances of interests in tribal lands, *e.g.*, §§ 311-323, §§ 396a-415.

insures that statutes impairing special rights of Indians, especially property rights, will be the product of an actual legislative choice, manifested by a clear and plain expression of congressional intent. Cohen (1982 ed.) at 222-224; *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-413 (1968); *Mattz v. Arnett*, 412 U.S. 481, 504-505 (1973).

This settled judicial and congressional doctrine effectively accords tribes a right to "due process of lawmaking" to protect against "legislative accidents" and unintended injury, and assures accountability when Congress abandons its role as trustee. *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 97-98 (1977) (Stevens, J., dissenting). Congress is presumed to deal with tribes in a straightforward and honorable manner, cognizant of its unique obligation, and never to intend to extinguish Indian property rights in a "backhanded way." *Menominee Tribe*, 391 U.S. at 412. The Court of Appeals was correct in invoking the canon that doubtful expressions are to be construed in favor of the Indians, for the construction of Section 17 championed by Petitioner is one of the most backhanded devices for extinguishing Indian property rights ever urged upon this Court.

E. There is no basis here for invocation of the doctrine of deference to administrative interpretation.

That the Department of the Interior actually acceded to the view that Section 17 provided authority for conveyances of Pueblo land, at least for a time, should not control this Court's interpretation of that section. Deference to an administrative interpretation of a statutory provision is proper only when Congress has delegated authority to the agency to resolve a question of interpretation. *Barlow v. Collins*, 397 U.S. 159, 165-66 (1970); *Chevron U.S.A. v.*

Natural Resource Defense Council, 104 S.Ct. 2778, 2782 (1984); see *United States v. Vogel*, 455 U.S. 16, 24 (1982). Where the question goes to the existence of a delegated power, not just its discretionary exercise, independent assessment by the reviewing court is called for. Coffman, *Judicial Review of Administrative Interpretations of Statutes*, 6 W.N. Eng.L.Rev. 1 (1938).²⁹

The question before this Court is whether Congress delegated broad power to the Secretary—clearly an issue as to the existence, not just the exercise of power. In the area of tribal property rights Congress has never before delegated to the Secretary of the Interior such unrestricted policy-making powers as is contended for in this case. *United States v. Arenas*, 158 F.2d 730, 747-48 (9th Cir. 1947), cert. denied, 331 U.S. 842 (1947); see *Chevron*, at 2781-2782. Such a delegation would be inconsistent with the otherwise carefully limited instances in which, under the Pueblo Lands Act, administrative officials could act to effectuate transfers of Pueblo title. See discussion *supra* at 14-18.

The circumstances here are not at all like those in *Chevron*, where this Court found that Congress did not intend to act on the specific issue (a highly technical issue in a highly technical regulatory statute) but instead left a "gap" for the interpreting agency to fill, and thus deference was proper; here, either Congress intended to delegate to the Secretary unqualified power to approve con-

²⁹ This proposition is evident in *Chemehuevi Tribe of Indians v. Fed. Power Comm.*, 420 U.S. 394 (1975). At issue in that case was whether the Commission's statutory licensing authority over power generating facilities included licensing authority over two thermal-electric generating plants located on navigable rivers. Although the Court noted and ultimately agreed with the Commission's determination that it did not, *id.*, at 409-410, the Court's own statutory construction and assessment of congressional intent dominates the opinion.

veyances or it did not.³⁰ The existence of that power is therefore a matter for judicial interpretation, and the doctrine of deference to agency interpretation is inapplicable.³¹

Even were the doctrine of deference properly invoked in this case, it should be of little help to Petitioner. The agency interpretation is devoid of basic characteristics deemed important by this Court in determining whether deference is warranted. The agency interpretation of Section 17 displays a complete lack of soundness and consistency in its evolution, nor was there any cogent process that led to its adoption or implementation.³²

³⁰ Cf., *F.E.C. v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981); *E. I. DuPont v. Collins*, 432 U.S. 46, 52-57 (1977); *Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 103, 121-22 (1973). That Congress had left a "gap" for the interpreting agency to fill is evident in each of these cases. Also instructive is *United States v. Vogel*, 455 U.S. 16, 24-25 (1981), where this Court held that because a Treasury regulation was promulgated only under the Internal Revenue Commissioner's general authority to issue regulations, the regulation was owed less deference than one issued under a specific grant of authority. And see, *Rowan v. United States*, 252 U.S. 247, 253 (1981).

³¹ See *Barlow v. Collins*, 397 U.S. 159, 165-166 (1970), where this Court held that "since the . . . dispute relates to the meaning of the statutory term, the controversy must be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction." See also *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 41, n.27 (1977) (whether a cause of action should be implied from provisions of Securities Act was one "peculiarly reserved for judicial resolution").

³² In *F.E.C. v. Democratic Senatorial Campaign Committee*, 454 U.S. 27 (1981), this Court, in upholding the challenged agency practice, stressed that the thoroughness and consistency of the agency in making the administrative determination and implementing it are factors that bear on the amount of deference due agency action. And see *S.E.C. v. Sloan*, at 117; *Overton Park v. Volpe*, 401 U.S. 402, 415 (1971) *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978); *Sidmore v. Swift & Co.*, 323 U.S. 134 (1949).

The government attorney who first acquiesced in using Section 17 as approval for Pueblo land conveyances, George Fraser, initially interpreted the statutory provision as a complete bar to conveyances. Kelly Report, *supra*, n.6, pp. 21-23, Exs. 35, 38. Just two days prior to the meeting that settled upon the new interpretation of Section 17, Fraser repeated his view that

. . . an act of Congress . . . , in my judgment, is the only way in which [the railroad] can obtain a legal right across the Pueblo. This is inevitable, in view of Section 17 of the Pueblo Lands Act above quoted.

Kelly Ex. 38.

The turnaround in the interpretation of Section 17, which occurred two years after its enactment, was the result not of some judicious enlightenment regarding the statute's construction but rather of low-level bureaucratic acquiescence to pressure from railroad and bond house lawyers. Kelly Report, pp. 23-36, Exs. 39-42. This doubtful and belatedly revised interpretation, invented by private lawyers and reluctantly accepted by the Interior Department, thus came out of convenience for the railroad and other companies faced with litigation over their questionable (or non-existent) rights-of-way across Pueblo lands. This process of decisionmaking cannot be characterized, as Petitioner contends, Pet. Br. at 35, as the kind of studied and detached problem-solving that gives weight to an agency interpretation. An interpretation that results from succumbing to pressure from private interests is not entitled to deference.

There were 79 rights-of-way granted under Section 17. The erratic record of these grants further indicates the dubious nature of this "administrative interpretation" as well as the tentative character of its implementation. Fifty-five of the 79 were granted during the period from 1926

to 1933, most of them to facilities that otherwise were thought subject to suit under the Pueblo Lands Act. After 1933, Section 17 conveyances were exceptional.³³ No conveyances were made under Section 17 after 1959 (and after 1946 Section 17 was used only for a group of canal rights-of-way that, but for their unlimited terms, complied fully with legitimate authority; Kelly Report, p. 38). Significantly, Interior approved a total of 779 rights-of-way under the 1928 Act and subsequent laws. App. 1. This pattern fails to establish a decisive, consistent, and longstanding administrative practice of the kind this Court has viewed with deference. See e.g., *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978) (Treasury regulation uniformly maintained over 80-year period); *Zemel v. Rusk*, 381 U.S. 1 (1965) (repeated, unquestioned imposition of area restrictions for foreign travel over 26-year period.)

Nor is there any basis for deferring to this ambivalent record on the ground that the Interior officials involved had a unique understanding of the Act derived from participating in its legislative process or by a particularly relevant expertise, factors considered important to this Court in *Chemehuevi Tribe of Indians v. Fed. Power Comm.*, 420 U.S. 394, 410 (1975) and *E. I. DuPont de Nemours & Co. v. Collins*, 432 U.S. 46, 56-57 (1977). See also, *Zuber v. Allen*, 396 U.S. 168, 192 (1969). The Pueblo Lands Act was the result of years of conflict and eventual compromise among numerous groups, including non-Indian settlers on the Pueblo lands, the Pueblo Indian tribes, the

³³ The Solicitor of the Department of the Interior determined in the early 1940s that rights-of-way were to be granted under the general right-of-way statutes made applicable to the Pueblos by the 1928 Act, not under Section 17. Despite that, Section 17 was intermittently resorted to thereafter since it provided a means of circumventing legitimate statutory and regulatory authority. Kelly Report, pp. 38-39, Exs. 98-100.

New Mexico congressional delegation, various Indian rights organizations, and the Department of the Interior. Kelly Report, pp. 1-13. Interior was by no means the primary actor, however, and there is no evidence it had any role in drafting Section 17. *Id.* at 10-13, Exs. 1-3. Cf. *United States v. Clark*, 454 U.S. 555, 565 (1982) (deference where agency is primary architect of legislation). Furthermore, the Interior agents, who were acting under pressure from a railroad company to legitimate its rights-of-way across Pueblo lands, were clearly less competent to interpret Section 17 than are courts presented with an extensive and previously unexamined legislative history.

The disputed administrative interpretation of Section 17 is in any event a substantial departure from a long history of federal policy toward Indian lands and the intended meaning of the statute.³⁴ And it is Congress' intent that controls over any administrative interpretation. Courts should not follow administrative actions found to be inconsistent with the statutory mandate or underlying congressional policy. *Chevron* at 2781, and n.9; *S.E.C. v. Sloan*, 436 U.S. 103, 117 (1977); *Federal Maritime Commission v. Seatrain Line, Inc.*, 441 U.S. 726, 745 (1973). *Escondido Mut. Water Co. v. La Jolla Indians*, 104 S.Ct. 2105, 2114 n.22 (1984). Where the general principle of

³⁴ The Solicitor General effectively admits to the revisionist character of this interpretation by asking the Court to find that Section 17 is valid authority for right-of-way conveyances *only*. U.S. Br. at 10, 17. Section 17 addresses all conveyances equally; rights-of-way, indeed, are one form of conveyance the section does *not* specifically list. There is no basis for treating rights-of-way differently based on statutory construction or as an assessment of congressional intent. This illogical effort by the United States to narrow the reach of a reversal of the decision below amounts to a concession that the interpretation of the section argued for by Petitioner (and developed in the asserted administrative practice) is wrong.

deference applies, it only "sets the framework for judicial analysis; it does not displace it." *United States v. Cartwright*, 411 U.S. 546, 550 (1973). This Court has firmly rejected the suggestion that an administrative determination be sustained simply because it is not "technically inconsistent with the statutory language where it is fundamentally at odds with congressional intent." *United States v. Vogel*, 455 U.S. 16, 24 (1981). The mere fact that a few of the hundreds of easements across Pueblo lands were, for reasons of expediency, purportedly granted under Section 17, fails to establish a conclusive interpretation. In *S.E.C. v. Sloan*, even though the practice was genuinely longstanding and supported by consistency, unlike here, this Court struck it down because it was manifestly wrong. See also *United States v. Midwest Oil Co.*, 336 U.S. 459 (1915) (executive cannot by course of action create a power). Nor does the mere passage of time validate unauthorized actions. *Cramer v. United States*, 261 U.S. 219, 234 (1923).³⁵

Deference to the asserted administrative interpretation here would, by the controlling standards, be inappro-

³⁵ Conceding, in effect, that Congress never intended Section 17 as authority for conveyances, the Solicitor General argues that that interpretation was effectively ratified by Congress in 1926 and 1928. U.S.Br. at 24-26. This argument, based on mere conjecture regarding Congress' silence on the specific issue, is entirely without foundation. In cases where this Court has found congressional acquiescence in an administrative practice by its silence, the Court has relied on clear evidence that Congress knew of the practice at issue. See, e.g., *Power Reactor Devel. Co. v. Int'l Union of Elec. Workers*, 367 U.S. 396, 408 (1961) ("[administrative] construction has time and again been brought to the attention of the Joint Committee of Congress on Atomic Energy"); *Haig v. Agee*, 453 U.S. 280, 297 (1981) ("legislative history clearly shows awareness of the Executive policy.") In *Power Reactor Co.*, this Court said, "It may

(Continued on following page)

priate. The faded administrative use of Section 17, characterized by shifting and doubtful reasoning, inconsistency and questionable judgments, should rather be taken as indicating that the interpretation was wrong.

II. MOUNTAIN BELL'S DISMISSAL FROM *UNITED STATES v. BROWN* IS NO BAR TO THIS ACTION.

Mountain Bell argues that its dismissal from *United States v. Brown*, bars the present action. Res judicata principles do not apply, however, because the cause of action on appeal is not the same as that in *Brown*, there was no adjudication on the merits or litigation of the validity of the Section 17 right-of-way, there was no consent decree, and the court did not have jurisdiction to enter a decree validating the Section 17 right of way.

(Continued from previous page)

be shaky business to attribute significance to the inaction of Congress . . ." 367 U.S. at 409. See also *Bob Jones University*, 103 S.Ct. at 2033 (1983) ("Non-action by Congress is not often a useful guide"); *Kent v. Dulles*, 347 U.S. 117 (1938). (Congress' failure to repudiate "scattered rulings" does not amount to acquiescence).

Nothing in the record suggests that Congress at any time knew of the questionable use of Section 17. Moreover, the circumstances surrounding the enactment of the 1926 and 1928 Pueblo right-of-way Acts indicate to the contrary. The 1926 Act, c. 282, 44 Stat. 498, was hastily drafted a mere month before its passage. Kelly Report, pp. 32-33). When the bill went to the House floor for consideration on the Consent Calendar the matter of Section 17 conveyances never arose. 67 Cong. Rec. 8633-8634 (1926). Consideration of the bill was confused and perfunctory. Rep. Morrow, its sponsor, stated that the United States held title to Pueblo lands. *Id.* at 8633. Rep. Leavitt described Pueblo lands as set aside by executive order. *Ibid.* There was no debate in the Senate. *Id.* at 842. The 1928 Act, 25 U.S.C. § 322, was enacted after the 1926 Act was held void. Kelly Report, pp. 35-36. Its history discloses absolutely no reference to the practice of approving easements under Section 17. This record fails to establish any basis for a finding of congressional acquiescence in, or even awareness of, Interior's use of Section 17.

A. Res judicata does not bar litigation of the validity of the § 17 right-of-way because the issue could not have been adjudicated in *United States v. Brown*.

The validity of Mountain Bell's right-of-way could not have been adjudicated in *United States v. Brown* and therefore a challenge to its validity is not barred by the prior dismissal.³⁶ "A judgment is not conclusive on any question which, from the nature of the case or the form of the action, could not have been adjudicated in the case in which it was rendered." *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). Where the jurisdictional statute of the first action does not permit a particular claim, that claim is not barred by res judicata. *Lower Sioux Indian Community v. United States*, 626 F.2d 828 (Ct.Cl. 1980).³⁷

³⁶ Even if the validity of the Section 17 right-of-way could have been adjudicated, a suit for trespass damages arising after the decree is a different cause of action. *United States v. Brown* was a quiet title action to determine title under the provisions of the Pueblo Lands Act. Trespass is a continuing harm giving rise to a new cause of action with each discrete period of time. *Richardson v. City of Boston*, 60 U.S. 263 (1856); *Newman v. Hiltat Elkhorn Coal Co.*, 302 F.2d 723 (6th Cir. 1962). If the issue of title had been adjudicated, there would be a question of collateral estoppel, but res judicata is not applicable. *Richardson v. City of Boston*, 60 U.S. 263 (1856). See *Lawlor v. National Screen Service*, 349 U.S. 322 (1955). Additionally, under the Act, only suits in equity to quiet title were authorized. Prior to the merger of law and equity, claims in law could not be brought in an action in equity. See, e.g., *Ash Sheep Co. v. United States*, 252 U.S. 159 (1920). Thus, even a final judgment in an equity suit under the Act could not bar claims at law which could not have been brought in the first action. *Id.*, *Bowless v. Capitol Parking Co.*, 143 F.2d 87 (10th Cir. 1944).

³⁷ See also *Creek Nation v. United States*, 168 Ct.Cl. 483 (1964). For purposes of determining the res judicata effect of a previous case brought by or on behalf of an Indian plaintiff, the prior jurisdictional statute is to be construed narrowly. *Lower Sioux Indian Community*, 626 F.2d at 83.

Suits pursuant to the Pueblo Lands Act were limited exclusively to adjudicating claims as set out in the Act. The statutory scheme is clear. The Board was to determine which of those persons who claimed title to Pueblo land met the requirements of Section 4, and the United States was to sue those who did not. Determinations of extinguishment of Pueblo title by the Board and the court were controlled by the requirements of Section 4(a) and (b). *United States v. Herrera*, No. 1720 Equity (D.N.M., May 24, 1928) (cited in *United States v. Wooten*, 40 F.2d 882 (10th Cir. 1930)); Kelly Ex. 21. Section 4 does not address post-Act conveyances or easements.³⁸ The government's authority to sue under the Act did not extend to easements arising after the Act.

Because the scope of the suit in *Brown* was limited by the Act and the laws of procedure at the time, the scope of its res judicata effect is similarly limited. *Rheinberger v. Security Life Ins. Co.*, 146 F.2d 680 (7th Cir. 1945) (where title was not properly an issue in a prior foreclosure suit, a city was not barred from raising its title in defense of a subsequent trespass action); see, also, *United Shoe Mach. Co. v. United States*, 258 U.S. 451 (1922). The validity of the Section 17 right-of-way was not a proper subject of the quiet title action in *Brown*, and

³⁸ As is apparent in numerous sections the "claims" to be adjudicated under the Act were limited to claims in fee. Sections 2, 3 and 4 provide for means of extinguishing Pueblo title. Section 4 refers to those "claiming title to, or ownership". Section 5 gives a claimant a quitclaim decree. Section 13 provides that patents and fieldnotes extinguish all right, title, and interest. Section 15 deals with improvements made by persons claiming ownership. In the only case under the Act where the issue was reached, the district court held it did not have jurisdiction to adjudicate rights-of-way. *United States v. Abeyta*, No. 2135 Equity (D.N.M. June 25, 1931). See Kelly Report, pp. 36-37, and Ex. 97.

Mountain Bell's dismissal from *Brown* does not bar the present action.³⁹

The district court had no power to adjudicate the validity of the Section 17 right-of-way. Its jurisdiction was limited to adjudicating claims of title in fee and it could only enter a decree in favor of those meeting the requirements of § 4(a) and (b). *United States v. Albeyta*, No. 2135 Equity (D.N.M. June 25, 1931). When a court lacks subject matter jurisdiction, the decree entered is void and without res judicata effect. *United States v. U.S. Fidelity & Guaranty*, 309 U.S. 506 (1940).⁴⁰

B. The adjudication in *Brown* was not on the merits.

Mountain Bell has failed to meet its burden of showing that the dismissal in *Brown* was on the merits, and it is apparent that it was not. Although there is a presumption that a dismissal in equity without qualifying words is a final adjudication on the merits, the "presumption of finality . . . disappears whenever the record shows that the court did not pass upon the merits . . ." *Swift v. McPherson*, 232 U.S. 51, 55-56 (1914).

³⁹ The mere fact that the Section 17 right-of-way was granted prior to the entry of the decree does not bar the litigation of its validity now where the prior suit was not intended to encompass the issue. *National Bank of Louisville v. Stone*, 174 U.S. 432 (1899); *Mellon v. Minneapolis St. P. & S.S.M. Ry Co.*, 11 F.2d 332 (D.C. Cir. 1926), cert. denied, 271 U.S. 678 (1926). This is so even if the court refers to the matter in its opinion. *East Tennessee Tel. Co. v. Board of Councilmen*, 190 F. 346 (C.C. Ky., 1911).

⁴⁰ Even if the dismissal were construed as a consent decree, it would be void. "The district court's authority to adopt a consent decree comes only from the statute which the decree is meant to enforce." *System Federation v. Wright*, 364 U.S. 642, (1961) (quoted in *Firefighters Local Union No. 1784 v. Stotts*, 104 S.Ct. 2576, 2587 n.9 (1984)).

There is no evidence the court considered the underlying claim against Mountain Bell in *Brown*. Given that Mountain Bell had not even answered, which would put the cause at issue (Eq. Rule 31) it is unlikely there could have been any adjudication on the merits. *Pueblo De Taos v. Archuleta*, 64 F.2d 807 (10th Cir. 1933). Particularly in the context of the Pueblo Lands Act, it cannot be assumed that the court would finally adjudicate the Pueblo's rights with no examination of the merits. See *United States v. Pueblo of Taos*, 515 F.2d 1404 (Ct.Cl. 1975).

The Act specifies in Section 5 that only a decree in favor of the claimant *after* a plea has been successfully maintained bars the United States or the Indians from asserting title in the future. The Order of Dismissal here (J.A. 36-37) was not a decree in Mountain Bell's favor. Compare, e.g., *United States v. Wooten*, 40 F.2d 882 (10th Cir. 1930). It simply allowed Mountain Bell to avoid the case, just as Mountain Bell was able to avoid nearly every other such case.⁴¹ Since it was not a decree under Section 5, it was not intended to have preclusive effect, and clearly was not a final adjudication on the merits for purposes of res judicata.

Because of the limited scope of suits under the Act, the Section 17 right-of-way merely mooted the complaint as to Mountain Bell. Cf. Kelly Ex. 39, p. 4. A dismissal for mootness is not an adjudication on the merits and has no res judicata effect. *DeVold v. Bailer*, 568 F.2d 1162 (5th Cir. 1978); *N.Sims Organ & Co. v. S.E.C.*, 293 F.2d 78 (2d Cir. 1961), cert. denied, 368 U.S. 968 (1962).

⁴¹ Mountain Bell was sued in only two other quiet title suits under the Act, and was dismissed from both. *United States v. Abeyta*, No. 1933 Equity (D.N.M. May 24, 1930); *United States v. Wooten*, 40 F.2d 882 (10th Cir. 1930).

The order of dismissal in *Brown* merely restates the government's motion. It was signed immediately upon its submission with the motion. (J.A. 36, 37, 63.) There is no evidence that the court considered Section 17 or the validity of the right-of-way, and that issue was clearly not contested.

"A decree is to be construed with reference to the issues it was meant to decide." *Vicksburg v. Henson*, 231 U.S. 259 (1913). The Court in *Vicksburg* stated:

"Every decree in a suit in equity must be considered in connection with the pleadings, and if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided"

The nature and extent of the former decree is not to be determined by seizing upon isolated parts of it or passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted and what the decree was really designed to accomplish. •

Id. at 269, 273 (quoting *Barnes v. Chicago, M. & St. Paul Ry. Co.*, 122 U.S. 1, 14 (1887). *Accord, Oklahoma v. Texas*, 272 U.S. 21 (1926) (prior decree reciting location of a boundary that was not directly in issue in the case did not bar litigation of the precise location of the boundary).

Where a statute controls the issues in a case, recitals with respect to matters incidental or collateral to the direct issue presented by the statute are not conclusive in subsequent proceedings about the same subject matter. *Norton v. Larney*, 266 U.S. 511 (1925); *United Shoe Mach. Co. v. United States*, 258 U.S. 451 (1922). *See, North Carolina R.R. v. Story*, 268 U.S. 288 (1925); *Harriman v. Northern Security Co.*, 197 U.S. 244 (1905).

C. No consent decree was entered.

Mountain Bell attempts to portray the events in *Brown* as a settlement agreement between the parties and a consent decree entered thereon.⁴² The facts surrounding the dismissal do not support this conclusion.

There was no negotiation between the government attorney and Mountain Bell regarding the suit, and Mountain Bell independently sought a new right-of-way. *After* it had been obtained, the government's attorney wrote the Company:

I am informed, however, that you have obtained a right-of-way deed from the Indians of this Pueblo and that it will be presently forwarded to Washington for approval. Please let me know if I am right in this, and if so, please inform me as soon as the transaction becomes complete.

(J.A. 65.) Mountain Bell subsequently informed Fraser of its right-of-way (J.A. 66, 67), and he then moved to dismiss Mountain Bell from the suit. (J.A. 68, 36.) The correspondence demonstrates that the right-of-way was not acquired in settlement of the case. Rather, Mountain Bell independently obtained it and the government dismissed the case against Mountain Bell as moot. No settlement agreement was made and the dismissal was not a consent decree.

⁴² Both Petitioner and AT&SF cite the congressional hearings as supporting the notion that the *Brown* dismissal was a consent decree, Pet.Br. at 46, n.35.; AT&SF Br. at 24, but the cited passages concerned the Jones-Leatherwood bill and the desire to dispose of the large percentage of "easy" cases without expense to the claimants, many of whom were poor. The Jones-Leatherwood bill's discretionary approach was rejected in favor of the preliminary investigation by the Pueblo Lands Board. 64 Cong.Rec. 5326-27 (1924); Kelly Report, pp. 6-8.

Despite Mountain Bell's attempt to distinguish *National Life & Accident Insurance Co. v. Parkinson*, 136 F.2d 506 (10th Cir. 1943), that case holds in a very similar fact situation that no consent decree was entered. In *Parkinson*, the appellant argued that even if the board's order at issue was void, the dismissal of his appeal from that order was a consent decree and was binding.⁴³ The court found, however, that no consent judgment was entered. The court stated, "we do not think that the order of the District Court merely consenting to the withdrawal of the appeal, to permit the second order of the Board... to become final and effective, rises to the dignity of a consent judgment or dismissal on the merits." *Id.* at 509.

There is even less support for a finding of a consent judgment in this case, because in *Parkinson* the dismissal and the tax reduction were a bargained-for exchange between the parties. The court concluded, "Courts do not validate that which is invalid by merely consenting to a dismissal of the controversy over which its jurisdiction has been invoked." *Id.* at 509.

Mountain Bell's reliance on *United States v. Parker*, 120 U.S. 89 (1887) is misplaced. The dismissal there was res judicata because the court had determined the merits of the controversy. *Id.* at 97. In *Jacobs v. Marks*, 182 U.S. 583 (1901), this Court distinguished the dismissal in *Parker* as an adjudication on the merits and not a decree entered merely upon settlement of the case. In fact, the

⁴³ Contrary to Mountain Bell's assertion, *Parkinson* was not based on a lack of jurisdiction in the first court. Such a holding would have been contrary to the law. *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940). (Compare *United States v. U.S. Fidelity & Guaranty*, 309 U.S. 506 (1940).) The court in *Parkinson* held simply that there had been no consent decree in the first suit.

Court in *Parker* distinguished dismissals by one party upon the written consent of the other, saying such dismissals have no res judicata effect. *Parker*, 120 U.S. at 96. Even less res judicata effect can be attributed to the voluntary dismissal in *Brown* where Mountain Bell never appeared.

Further, in *Parker* the government sought in the second suit to recover the same debt it was seeking in the first suit. In contrast, the Pueblo is challenging the validity of a right-of-way that was not in issue in the first suit but rather was the cause of the dismissal. Such a challenge is not barred. *Texas & Ry Co. v. Southern Pacific Co.*, 137 U.S. 48 (1890) (collateral estoppel applied only to the matters of pre-existing differences, settled and compromised, and not to the validity of the contract that terminated the lawsuit, which was not in controversy or passed upon in the causes in which the decrees were rendered). See also, *Donald F. Duncan, Inc. v. Royal Tops Mfg. Co.*, 343 F.2d 655 (7th Cir. 1965) (consent decree inherited all the infirmities of the license upon which it was entered and afforded no legal basis for res judicata).

The decree in *Brown* must be viewed in the context of the limited nature of the suit, one to challenge pre-existing claims intended to be resolved by the Pueblo Lands Act. The validity of Mountain Bell's right-of-way was not relevant to its dismissal; its acquisition, valid or not, was all that was relevant in the limited nature of the suit brought. The recital in the order was not intended to establish the validity of the Section 17 right-of-way, and that perfunctory order is no bar to this action.

CONCLUSION

The Pueblo Lands Act and this Court's three unanimous decisions addressing the status of the Pueblo Indian tribes, *United States v. Sandoval*, 231 U.S. 28 (1913), *United States v. Candelaria*, 271 U.S. 432 (1926), and *United States v. Chavez*, 290 U.S. 357 (1933), eliminated all doubt that the Pueblos were tribal Indians entitled to the same protective guardianship as other tribes. Section 17 served Congress' purpose of proclaiming that fact. Petitioner and assorted *amici* urge the Court's acquiescence in the perversion of this long-settled principle. The decisions below, recognizing the consistent treatment of the Pueblos by Congress and this Court, are well-founded and should be affirmed.

Respectfully submitted,

RICHARD W. HUGHES
SCOTT E. BORG
S. JAMES ANAYA

LUEBBEN, HUGHES & TOMITA
201 Broadway, S.E.
Albuquerque, NM 87102
(505) 842-6123

*Attorneys for Respondent Pueblo
of Santa Ana*

January 7, 1985

APPENDIX A

UNITED STATES DEPARTMENT
OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Albuquerque Area Office
P.O. Box 8327
Albuquerque, New Mexico 87198

320—Statute of
Limitations

Dec 28 1984

Memorandum

TO: Solicitor
Attn: Michael Cox, Attorney-Advisor

FROM: Area Director

SUBJECT: Pueblo Rights-of-Way Granted Pursuant to
Section 17 of Pueblo Lands Board Act of
1924

Pursuant to your request, the following information is provided concerning rights-of-way across Pueblo lands. The Pueblo agencies have calculated the total number of rights-of-way granted across tribal lands to be 779 (excluding the rights-of-way which were granted under Section 17 of the Pueblo Lands Act of 1924). The breakdown is as follows:

Southern Pueblos Agency	424
Laguna Agency	110
Northern Pueblos Agency	220
Zuni Agency	25
TOTAL	779

The total number of rights-of-way granted pursuant to Section 17 appears to be 79, according to computations

App. 2

done in 1982. Most of them (59) are reported from the Southern Pueblos Agency which did include the Pueblo of Laguna in its' jurisdiction in 1982. Laguna now has its' own agency.

With reference to the rights-of-way of the three companies submitting briefs in the case *Pueblo of Santa Ana v. Mountain States Telephone and Telegraph Company*, Civil No. 84-262, the following information is provided. Mountain States Telephone and Telegraph Company (Mountain Bell) has acquired 26 rights-of-way from the Pueblos. All of the lines except for two have been abandoned or have been replaced by telephone cables under new rights-of-way agreements using authority other than Section 17. The two standing lines are at Santo Domingo and Taos Pueblos. The right-of-way at Santo Domingo was recently reapproved under other authority as part of a comprehensive agreement between Mountain Bell and that Pueblo. The Taos line is therefore the only existing telephone right-of-way for Mountain Bell under Section 17. Mountain Bell has acquired comprehensive agreements similar to that at Santo Domingo from most of the other Pueblos. These agreements also provide for settlement of trespass claims against Mountain Bell and dismissal by the United States Attorney's Office of the case *United States of America, on behalf of the Pueblos of Acoma, Isleta, Jemez, Laguna, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Clara, Santo Domingo, Taos, Tesuque, and Zia v. Mountain States Telephone and Telegraph Company, Inc., and Continental Telephone Company of the West*, Civil No. 82-1513-M.

The Atchison, Topeka and Santa Fe Railway Company has its main line right-of-way across seven of the Pueblos for

App. 3

a distance of 114.74 miles according to agency computations. Of that mileage, 27.54 miles were approved pursuant to Section 17, as follows:

Acoma	6.64 miles under Section 17
Laguna	10.0 miles under Section 17
Isleta	8.43 miles under Section 17
Sandia	0.0 miles under Section 17
Santa Ana	2.07 miles under Section 17
San Felipe	0.40 miles under Section 17
Santo Domingo	0.0 miles under Section 17

Most of the Railway Company's agreements (19 total) under Section 17 appear to have been for stone and water, pipelines, station grounds, telephone lines, and arroyo reinforcement.

Public Service Company of New Mexico has seven rights-of-way approved under Section 17. Each of these was approved for a term of fifty years and all of them have expired and been re-negotiated under other authority except for the right-of-way at Isleta, which expires in 1986.

I hope this information will be of use to you. We have not been able to determine the exact number of rights-of-way granted under Section 17 that are still in use, but will develop that information. Two of the companies that acquired several rights-of-way under Section 17 were the Postal Telegraph-Cable Company and Western Union Telegraph Company. The former company has been defunct for years and Western Union has abandoned most of its lines, but we have not yet determined whether other companies acquired any of the rights of these two companies.

App. 4

If you have any other questions, please call Ethel J. Abeita,
Statute of Limitations Coordinator for the Albuquerque
Area Office at (505) 766-3868/FTS 474-3868.

Sincerely,

/s/ Charles R. Tate
Acting Area Director

App. 5

APPENDIX B

UNITED STATES DISTRICT COURT
District of New Mexico
SANTA FE, NEW MEXICO 87501

SANTIAGO E. CAMPOS
JUDGE

October 29, 1984

L. Lamar Parrish, Esq.
Catherine Baker Stetson, Esq.
Attorneys at Law
P.O. Box 487
Albuquerque, New Mexico
87102

Ray Shollenbarger, Esq.
Attorney at Law
500 Copper, NW, Suite 300
Albuquerque, New Mexico
87102

Louis E. Valencia, Esq.
County Attorney
P.O. Box 669
Bernalillo, New Mexico 87004

Thomas C. Esquibel, Esq.
Attorney at Law
P.O. Box 238
Los Lunas, New Mexico 87031

Pamela Hanson, Esq.
Attorney at Law
P.O. Drawer AA
Albuquerque, New Mexico
87103

William L. Lutz, Esq.
United States Attorney
P.O. Box 607
Albuquerque, New Mexico
87103

Hugh W. Parry, Esq.
Kendall Fischer, Esq.
Assistant Attorneys General
P.O. Box 1149
Santa Fe, New Mexico 87504

Ted Apodaca, Esq.
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504

Hunter L. Geer, Esq.
Attorney at Law
P.O. Box 8248
Albuquerque, New Mexico
87198

John S. Thal, Esq.
Attorney at Law
P.O. Box 2168
Albuquerque, New Mexico
87103

RE: Pueblo of Isleta v. Watt, et al.; No. 82-1504 C
Pueblo of Sandia v. New Mexico State Highway
Commission et al.; No. 82-1522 C
Pueblo of Isleta v. Public Service Company of
New Mexico, et al.; No. 82-1535 C
Pueblo of Isleta v. Atchison, Topeka & Santa
Fe Railway Co.; No. 82-1537 C
Pueblo of San Juan v. Mountain States Tel. &
Tel. Co., et al.; No. 82-1541 C

Dear Counsel:

In 53 U.S.L.W. 3257 (10-9-84) it is reported that the United States Supreme Court has granted certiorari in *Pueblo of Santa Ana v. The Mountain States Telephone and Telegraph Co.*, — F. 2d —, No. 83-1220 (10th Cir. May 14, 1984); No. 80-841-M

Counsel of Record

October 29, 1984

Page 2

RE: Cases 82-1504, 82-1522
82-1535, 82-1537, 82-1547

(D.N.M. June 2, 1982). The prior abatement of the cases listed above should, therefore, be continued.

An order has been filed to accomplish this. A copy applicable to your particular case is enclosed.

Unless, at this time, the mindset of the parties is all or nothing and if there is any thought of compromise prior to decision by the United States Supreme Court, I will offer for your consideration the possibility that the holding in *Ohio Oil Co. v. Sharp*, 135 F.2d 303 (10th Cir. 1943) may be applicable in this case, i.e.:

It is well settled that one who invades or trespasses upon the property rights of another, while acting in the good faith and honest belief that he had the lawful and legal right to do so, is regarded as an innocent trespasser and liable only for the actual damages sustained.

Ohio Oil Co., supra, at 308.

And then there is the further possibility that if above is applicable in this case, that what was originally paid for the right of way easements in question may be an accurate measure of "actual damages sustained," such that

damages for past trespasses, if trespasses there be, would result in a wash.

Judge Robert W. McCoy has been conducting settlement conferences in some of my cases. Do you feel it worthwhile meeting with Judge McCoy for exploration of settlement possibilities?

Sincerely,

/s/ SANTIAGO E. CAMPOS
UNITED STATES DISTRICT
JUDGE

Encl.

cc: The Hon. Edwin L. Mechem
The Hon. Robert W. McCoy

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

Civil Action No. 80 841 M
PUEBLO OF SANTA ANA
Plaintiff,

v.

MOUNTAIN STATES TELEPHONE AND
TELEGRAPH COMPANY

Defendant.

**DEFENDANT'S RESPONSE TO PLAINTIFF'S
SECOND REQUEST FOR ADMISSIONS**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, the Defendant The Mountain States Telephone and Telegraph Company (hereinafter called "Mountain Bell") responds to the Plaintiff's Second Request for Admissions as follows:

REQUEST FOR ADMISSION NO. 1:

Mountain Bell knows of no documents within its possession, control, or knowledge indicating that it or its predecessor in interest obtained from Santa Ana Pueblo or the Department of the Interior in the period 1900-1926 a right-of-way or easement for a telephone line across Santa Ana Pueblo land.

RESPONSE TO REQUEST NO. 1:

Although Mountain Bell's searches to date have not produced any document to establish conclusively that it or a predecessor in interest obtained a right-of-way across

Santa Ana lands from the Santa Ana Pueblo or the Department of the Interior in the period 1900-1926, there are indications in the Statement of Property Owners and in the files produced by Mountain Bell to Plaintiff in response to Plaintiff's discovery that Mountain Bell may have obtained such a right-of-way during the period in question.

...

App. 10

APPENDIX D

EL PASO, Texas,
January 16th, 1928.

Mr. N. O. Pierce,
General Plant Manager,

Dear Sir:

Transmission of Tracings covering El Ranchito Grant (sometimes known as Santa Ana—El Ranchita Indian Purchase).

I am forwarding under separate cover, two tracings covering Denver—El Paso Toll Line through the El Ranchito Grant, this grant is sometimes known as the Santa Ana—El Ranchito Indian Purchase.

Also four copies of field notes covering this grant.

Yours truly,

J.A. KELLY,
Plant Superintendent.

P.S. This is the Grant that we did not know belonged to Indians as it is located several miles from the Santa Ana Pueblo, but is the Grant referred to in a recent summons sent us.

App. 11

APPENDIX E

Excerpts from Hearings on H.R. 13452 and H.R. 13674 before the House of Representatives Committee on Indian Affairs, 67th Cong. 4th Sess. (1923)

House Hearings Page 17-18—Mr. Wilson: "1910. In that act there was a specific provision in the compact requiring the State of New Mexico to give up and surrender, if it had any, to the Congress of the United States all jurisdiction and right over the lands of any Indians deriving title from the United States of America or from any prior sovereignty, and reserving jurisdiction of Congress over those lands until the title of the Indian had become extinguished and ceased to exist. That is not exactly the wording, but in effect the wording."

Again, in a further provision it said that lands of the Pueblo Indians of New Mexico should be considered Indian country within the meaning and intent of the laws of the United States on that subject, and making it a crime to introduce liquor into Indian country."

Mr. Collins: "Is that part of the same act of 1910?"

Mr. Wilson: "Part of the enabling act. The constitution of the State accepted those provisions, which became law, thereby Congress practically taking from within the exterior boundaries of the State of New Mexico those tracts of land, and stating that Congress alone should legislate concerning them. There you will see the reasons why we come to Congress for legislation, but that is not all. The constitutionality of that provision, the right of Congress to impose such a condition on New Mexico, came up in what is known as the Sandoval case in 1912 That

case was appealed by me to the Supreme Court of the United States, and then handled by the Department of Justice. It was reversed by the Supreme Court of the United States, which held that Congress had a general right to impose such a condition because it had the constitutional right to legislate concerning a dependent people, and that the Pueblo Indians were such a dependent people within the meaning of the constitutional power of Congress to legislate."

Mr. Leatherwood: "Is it not true that the Sandoval case was decided on the theory of the guardianship of person and not of property?"

Mr. Wilson: "Yes, sir; but, Mr. Leatherwood, a point about that is this, that there has been actually no real definition of the extent which the supreme court meant to go in the Sandoval case. It is rather an interesting thing that nothing has yet come up whereby the extent of the holding there has actually come out. The point, however, is this, that for the first time the highest court of the land has held, did hold, that these people were wards and the Government of the United States owed the same duty toward them and their care and protection that it owed toward any other Indians hitherto classified as dependent people and subject to such legislation. Immediately the question arose in New Mexico, whether all these titles which were acquired since 1848 under the status which I have endeavored to briefly describe to you as existing prior to the enabling act or prior to the Sandoval case, could not be defeated by the United States of America, because most of them had become good through the New Mexico statutes of adverse possession."

House Hearings Page 21—Mr. Wilson: "The reason they were was, as I have tried to explain, that the Sandoval case reversed what we might call a rule of property which had been created by preceding decisions as regards their right to acquire title to those lands. When the Sandoval case was decided it was decided that those Indians were a dependent people, wards of the Government, and that Congress can legislate about them and should be their protection."

House Hearings Page 22-23—The Chairman: "Are we going to get anywhere if we get legislation to clear the situation down there, clear up the titles?"

Mr. Wilson: "You can, because the atmosphere there was cleared by the Sandoval decision, which was not the case when I was attorney. Then we did not know the effect of it."

Mr. Sears: "My colleague, Mr. Hayden, has just left. I wanted to ask a question while he was here. He stated that where a bona fide settler comes into court he is entitled to certain rights. As I understand the Indian matters, having been on this committee for eight years, the Indian is the ward of the Government and like a minor who has to go into court through a guardian he is helpless. Therefore, knowing he is helpless, when I go and squat on his land, what right have I if I lived there 50 years?"

Mr. Wilson: "Not at all."

House Hearing Page 26—Mr. Sears: "They are in honor bound to. It is in the statute, and the guardian can not waive the limitation. The Indian is helpless; the Government in good faith can not waive any right that the Indian

has. You can go into court and if you do not go into court you are estopped, but your guardian can not supinely sit and refuse to go into court and let you lose your rights, the Government can not do it."

Mr. Wilson: "The Government has got to do it or be subject to criticism."

Mr. Sears: "Are they doing that now?"

Mr. Wilson: "Colonel Twitchell means to do his duty, and if he thinks he has a good right, that they can not raise the statute of limitations against the Government. If he does that it will put most of them off."

Mr. Gensman: "That being the case, do you not feel certain that eventually those suits will be brought in a court of competent jurisdiction before a judge that you say is one of the best in the country?"

Mr. Wilson: "What we are afraid of is that the technicality which the Government as the guardian of these Indians is bound to interpose will result in a thing that the Indians do not want and the Government does not want, destruction of the rights of the settlers, some of them bona fide, but the Government is bound to do it since it can not be otherwise."

Mr. Gensman: "Some will win that ought not to win and some will lose that ought not to lose?"

Mr. Gensman: "They will all lose regardless of right or wrong?"

Mr. Wilson: "Yes, sir."

House Hearings Page 40—Mr. Wilson: "The Sandoval case, yes; it was important because it was then determined

the Indians were wards of the Government in that decision."

The Chairman: "They did not take up any question of title."

Mr. Wilson: "No."

Mr. Roach: "That makes it a judicial determination. I had not read this, but it may have been like a lot of similar cases, where the judge in writing an opinion runs far afield among subjects which is not deciding."

Mr. Gensman: "And didn't know what he was talking about."

Mr. Wilson: "The point about that is this, that always prior to that time these Indians had been considered free agents who could buy and sell the same as anybody else. That case decided that they were not free agents but were wards, and that condition had existed since 1848 as far as this Government was concerned."

Mr. Gensman: "And determined that in a whisky case."

Mr. Wilson: "Yes, they had to determine that question and the consequences as I have stated them followed, and every lawyer here will tell you that is a fact."

House Hearings Page 42-43—Mr. Burtness: "The decision of the United States Supreme Court did not change in any shape, manner, or form the respective rights of the parties, but simply laid down under the law saying what it had been. It was simply an adjudication. While I do think that statehood might have changed to some extent the situation of these parties, under the enabling act and

the acceptance thereof the courts of New Mexico, the people of New Mexico, relinquished jurisdiction over these Indians expressly to the United States. The decision of the Supreme Court changes no rights in any shape, manner, or form: simply adjudicated them."

Mr. Leatherwood: "The status of the Indians?"

Mr. Wilson: "Absolutely went back to 1848."

Mr. Leatherwood: "Based upon what the Indians had been all that time it laid down the law."

Mr. Wilson: "The enabling law was only a link from 1848 down to the date of the decision."

House Hearings Page 63—Mr. Wilson: "I do not think it is fair to take the State statute and Territorial statute as the basis of title against those Indians because they were not in the position of the ordinary citizen to protect themselves and could not and did not protect themselves. To make any comparison between the status of the Pueblo Indians in their rights under our State and Territorial adverse statutes with the status of the ordinary citizen is impossible without doing a grave injustice to the Indians. That is the actual fact."

Mr. Weaver: "Since the enabling act when Congress took jurisdiction of these matters, then, of course, any suit would have had to be brought by the United States Government."

Mr. Wilson: "As a matter of fact, the full realization of the effect of the enabling act did not dawn upon anyone for a while. When the Sandoval case came up it was flatly before the courts and when that decision was

rendered by the Supreme Court of the United States we began to see how far-reaching it was. We were so thoroughly saturated with the conception of the law prior to that time that it took time to get the idea out of our heads that there was a different status and that different status had really always existed, as the opinion in the Sandoval case decided."

House Hearings Page 72-73—The Chairman: "Where has the Government of the United States failed in its effort to protect the Indians since the State of New Mexico became a State?"

Mr. Wilson: "Because from 1848 to the present time people have gone on this land on the assumption that they can acquire right under the territorial and State statute by adverse possession, that purchase from the individual Indian gave a right under the statute of limitations. The Indians have not been able to protect themselves in the same manner as the average citizen of New Mexico would be able to do because of their dependent condition. Now, it was the duty of Congress to see that their rights were protected or that these territorial statutes did not apply to them, which could have been readily done because during territorial days Congress had plainly power to legislate concerning the Territory of New Mexico. When the enabling act was passed it did in effect undertake a piece of legislation which would make it possible for Congress to do that which it should have done."

Mr. Roach: "Has there been any dereliction since the enabling act or delay on the part of the Government since the enabling act?"

Mr. Wilson: "We think so because we think this legislation should have been initiated sooner by the Government. The things have gone on since that time."

Mr. Burtness: "No title is conveyed by those encroachments if they have been made. What I am trying to get at is that even if there has not been legislation since the enabling act, in the enabling act the jurisdiction over these lands was expressly held in the United States Government, and in the interim in which these surveys were made the United States court has been the only court which had any jurisdiction over title to this Indian land. Even if there has been encroachments made those matters can still yet be accounted for. The Government or the Indian is not losing anything so far as losing it is concerned. The mere fact that somebody extended his fences and took 500 acres that did not belong to him is not final. The Government can take that away from him now and will do it under the provisions of this bill, will it not?"

Mr. Wilson: "Yes; if it has proof of no conflict or whether he had the right to extend his fence, and possession of it, etc. That is going into the question of what is going to happen in court."

Mr. Roach: "Whether the Indian has really lost anything so far as losing it is concerned by reason of the failure of the Government to enact legislation of this character or some other character?"

Mr. Wilson: "No."

Mr. Roach: "Not since the adoption of the enabling act has the Indian actually lost anything."

Mr. Wilson: "No; only rights to recover."

Mr. Roach: "His rights should not be affected because the Government reserves those rights in the enabling act, reserves exclusive jurisdiction and control."

Mr. Wilson: "The rights; yes."

Mr. Roach: "How can the Government or its officers be criticized for taking something away from the Indian by reason of failure to enact particular legislation that you think should have been acted?"

Mr. Wilson: "As time goes by and more time goes by we lose the equities of the Indians."

Mr. Roach: "I agree with you it may have been proper to legislate, but I do not agree with you that the Government is subject to criticism by failure of particular legislation which it should have enacted. What has the Indian lost?"

Mr. Wilson: "I think he has lost water constantly by misappropriation constantly going on all the time of the Indian water by settlers who are putting it on their land or increasing the use of the water. They are taking it from the Indian all the time."

Mr. Roach: "Let us see whether he has or not. Here is one of the pueblos which has water on its land. Title to that land and jurisdiction of the title to that land by the enabling act was put in the Government of the United States."

House Hearings Page 145—Mr. Burtness: "Do I understand, then, that the Supreme Court of the United States had laid down a different rule, in so far as their property is concerned, from the Sandoval case, which, as I under-

stand it, covered the situation as far as their persons were concerned?

Colonel Twitchell: "In its conclusions, and in every possible way in which a man can arrive at a conclusion, the opinions of the Supreme Court of the United States, in *United States v. Joseph* and *United States v. Sandoval*, are radically opposed to each other. The case of *United States v. Sandoval* practically reversed the case of the *United States v. Joseph*."

House Hearings Page 213-214—Mr. Roach: "You talk about titles being tried in the J. P. courts. Do you not appreciate the fact that in the enabling act following New Mexico's statehood, that the reservation was contained in the enabling act placing jurisdiction and control of land titles of the Indians down there in the Government itself?"

Mr. Collier: "Yes, sir."

Mr. Roach: "What is there that could be done since that that could in any way affect those titles, keeping in mind that the statute of limitations does not run against the Government. Those encroachments that you spoke of, I have no doubt that they exist; I have no doubt that fences have been extended there beyond the Indian lands improperly, but that, permit me to remind you, does not lose the Indian his title, or it does not in any way affect the right of the Government to go in there and eject the trespassers."

Mr. Collier: "But they lose the use of the land."

Mr. Roach: "Therefore the Indian title has never been affected."

Mr. Collier: "Has not been; but if the Bursum bill passes, we maintain it would be."

Mr. Roach: "In answer the question of Mr. Leatherwood this morning, asking you to state an instance whereby by any direct overt act they had lost land you stated the encroachments that occurred in extending their fences as an instance where the Indians had been robbed of their lands."

Mr. Collier: "Yes."

Mr. Roach: "It is apparent to my mind that they may have lost temporary possession but they have not lost a single foot of land or any title to land in those acts to which you have called attention."

House Hearings Page 286—Mr. Reuben: "There is a serious question as to whether or not all of these titles are fundamentally good, the cloud being created by the decision of the Supreme Court of the United States in the Felipe Sandoval case. Prior to that time there was no doubt in the minds of lawyers or layman that the persons living upon these grants had a good and valid title, but a cloud has now been created by uprooting the decision found in the Antonio Joseph case and the creation of the doctrine of tutelage, and attempting to throw that doctrine back so that it operates over two centuries and a half and not merely 1910, 1912, or 1913, the time when the decision was rendered. Thus we find ourselves in this turmoil and in this trouble; thus it happens that four suits have been brought in the United States District Court for the ousting of the occupants of tracts of land numbering about 600, affecting people to the number of about 1,200 men, women, and children. There are only 4 grants involved in those suits and there are some 16 other grants yet to be brought under the same form of attack. Thus you can see our trouble. The Attorney General has gone into the Federal court, and I have the allegations and prayer of the complaints herein;

in substance it is that these people have no right, title, or interest in the lands they occupy; that while it is true they have deeds, that those deeds were not recognized or were not made with the authority of the Spanish or Mexican Government or of the United States Government; that these people should bring their deeds into court to be canceled, and that they shall be ousted from the possession of the lands which they and their ancestors have, in many instances, occupied for more than 300 years. There is the practical condition with which we are faced."

Mr. Sears: "Without expressing any opinion but trying to get at the facts, these cases are now in the courts, and as a representative of the Government and as a lawyer do you not think that the courts should be permitted to decide them and that Congress should not pass a law settling those cases before the courts decide them?"

Mr. Renehan: "I might say that if the settler could urge the plea of the statute of limitations against the Government—"

Mr. Sears: (Interposing). "Of course, that can not be urged against a ward, a minor, or an imbecile."

House Hearings Page 309—Mr. Burtneß: "At any rate, the title was that, if Mr. Wilson and Colonel Twitchell are correct in their construction of the law, the chances are that he would be evicted under this various remedial legislation."

House Hearings Page 314—Mr. Roach: "Yes; they were; but when Congress reserved title or jurisdiction over title to all the lands within those grants it was then the particular duty of the Government of the United States to see that the interest and title of the Indians within those grants

were protected, because they assumed guardianship voluntarily, the Government on its own part. You have established in a way, or sought to establish, that the Indian was a free agent and a citizen and had a right to act, but here comes the Government of the United States along and says that he is not, but that he shall be my ward, and makes him its ward. I have got my own notion about this."

Mr. Renehan: "No; Congress, as I have said—"

Mr. Roach: (Interposing). "It seems to me that the Government had responsibility to these Indians. Whether they were citizens or not is another question. The Government has decided that they were not, but that they would be wards of the Government so far as land and title to land is concerned. It is up to the Government to make good on its guardianship."

House Hearings Page 345-346—Mr. Wilson: "As regards Mr. Renehan's argument concerning the law prior to 1910, I want to express to the committee very clearly, if I can, our position as to that. We contend that the Sandoval case settles the law so absolutely that there is no use of arguing what the law should have been or might have been if the Sandoval decision had not been rendered. That the matter decided in that case is this: That the Pueblo Indians of New Mexico since 1848 have been wards of the United States of America. And as a conclusion from that result arrived at by that court, we contend that since 1848 that Government of the United States is in the position of owing to these Indians reparation for anything which they may have lost through the neglect or failure of the United States to perform that duty."

House Hearings Page 347—Mr. Wilson: "The military occupation was 1846, but the treaty of Guadalupe Hidalgo

was not signed until 1848, whereby New Mexico became permanently a part of the United States. The date was February 10, 1848, and from that time on it is our contention that the confirmatory acts of Congress did give to those Indians every acre of land which was not at that time by the treaty of Guadalupe Hidalgo taken away from them under the Spanish or Mexican dominion or sovereignty."

Mr. Roach: "The Government, in other words, either of its own voluntary act or through act of Congress took charge of that situation generally from 1848 down to the present time."

Mr. Wilson: "Yes, sir; and the Sandoval case, regardless of Mr. Renahan's contention, so held."

With that brief statement in that connection, which I have tried to clarify because I do not think I did make it clear in going over my own record prior to this time.

Now, Mr. Chairman, I do not think that the general statements made by Mr. Renahan with reference to the law are important to rebut, because the Sandoval case settles the law until the Supreme Court of the United States reverses itself there; and regardless of any opinion as regards that particular decision, that remains the law and will remain the law."

House Hearings Page 371—Mr. Meritt: "I also wish to place in the record the decision of the United States Supreme Court in the Sandoval case. That has not yet been incorporated in the record, but referred to in the record a number of times. It is reported in 231 U.S. 28.

In connection with this decision I want to say that the Indian Bureau is responsible for the provisions going into

the New Mexico enabling act regarding the Pueblo Indians. We insisted that these provisions should go in for their protection. As a result of that legislation we have the decision of the Supreme Court in the Sandoval case, which, I believe, will result in good to these Indians. My interpretation of the situation is that it is absolutely impossible for any pueblo or any Pueblo Indians to lose any of his land since the New Mexico enabling act."

Mr. Roach: "That is, to lose the legal title."

Mr. Meritt: "To lose the title since the New Mexico enabling act, and credit for that legislation is due to the activities of the Indian Bureau. The decision in the Sandoval case (231 U.S. 28) referred to is as follows:" [Recites *Sandoval* decision].

House Hearings Page 408—Albert B. Fall: "I desire to say, unequivocally, that I most heartily indorse the statement in the first paragraph of these resolutions, to the effect that the duty rests upon the Government of the Republic to take the measures necessary to preserve the homes and the land holdings of the Pueblo Indians. I further indorse the statement that these Indians are wards of the Republic. (The Supreme Court in the Sandoval case has so held.)"

APPENDIX F

Excerpts from Hearings Before a Subcommittee of the Committee on Public Lands and Surveys, United States Senate, 67th Congress, 4th Session on S.3855 and S.4223, Bills Relative to the Pueblo Indian Lands (1923): ("1923 Senate Hearings")

Senate Hearings Page 57—Colonel Twitchell: "In the Joseph case it was accepted by the bar of New Mexico, and elsewhere throughout the United States having jurisdiction of these matters it was accepted, that the Pueblo Indians had a right to alienate their lands in a proper manner; and that contention and belief continued down to the time that New Mexico was admitted into the sisterhood of States; at which time, owing to the compact entered into between the people of New Mexico and the Government of the United States, the people of New Mexico surrendered all jurisdiction over these Pueblo Indians, their real property, and the areas held and occupied by the Pueblo Indians became and were denominated "Indian Country"."

Senate Hearings Page 58—Colonel Twitchell: "... after a careful consideration of the entire subject matter, the Supreme Court of the United States delivered its opinion in which it announced the principle that since the compact entered into between the people of New Mexico and the people of the United States, not only had that jurisdiction been surrendered, but it declared in terms that at the time of the Treaty of Guadalupe Hidalgo these Pueblo Indians were in a state of tutelage, and came under the guardianship of the people and Government of the United States in that capacity; that they were a dependent people within the meaning of the law and the term, and it was the sov-

ereign duty of the United States, as a government, to protect them in all their rights regardless of any propositions which might be put up to the contrary, and practically, in terms overruling the Joseph case."

Senator Lenroot: "Do they attempt to distinguish, or do they discuss the Joseph case.?"

Colonel Twitchell: "They do. The opinion in United States v. Sandoval is a very lengthy opinion. It is in 231 U.S."

Senator Lenroot: "I think that decision had better go in the record."

Senator Bursum: "There was no question before the court affecting land titles?"

Colonel Twitchell: "No; not under that decision. But the Senator is raising at this time, by inference, the real question here, and that is whether or not under the principle announced in the Sandoval case the position of the Indian would be held to be the same as for offenses arising under the laws in regard to the introduction of liquor into Indian country. I will meet that, if I possibly can, Senator, in the argument.

After the decision in the Sandoval case all of these matters were considered by the Department of the Interior, the Bureau of Indian Affairs, and the Department of Justice, and a number of suits were filed in the United States Court for the District of New Mexico, seeking to evict and oust individuals holding tracts of land within the exterior areas of some of these Pueblo Indian grants."

Senate Hearings Page 73—Senator Lenroot: "I quite understood, Mr. Commissioner, the point that the depart-

ment was giving them greater consideration and latitude; but my point was whether the department was making any disclaimer with reference to protecting their rights, and alienation of property, or things of that sort?"

Commissioner Burke: "Not at all, Mr. Chairman, we are going to the same extent."

Senator Lenroot: "I supposed so."

Senate Hearings Page 74—Senator Bursum: "Is it not true that one of the reasons for placing the jurisdiction in the United States court is that under the enabling act Congress is vested with the control of these lands?"

Colonel Twitchell: "Yes; under the enabling act and under the compact as between the people of New Mexico and the Government of the United States we relinquished all jurisdiction in all of their lands as Indian country."

Senate Hearings Page 88—Colonel Twitchell: "So far as that is concerned, I have this to say, that in the matter of land alienation, so far as the Pueblos are concerned, I am strictly opposed to any power being granted to anybody for an alienation of their lands, and if in any way in any section of this bill, outside of the solution of the adverse holdings, so provides, I do not favor any act which will enable any of these communities in the future at any time, until they are placed upon the basis the same as any other American citizens, being permitted to alienate their lands."

Senate Hearings Page 113—Mr. Walker: "I think an Indian, even with a great deal of education shows some inability to grasp, in the sense that we think we have the ability to grasp, senses of values, the value of time, the

meaning of money and securities, and so forth; and sometimes, under exceptional circumstances, he is even a little bit uncertain on a close question of meum and tuum. I should not regard the Indians as ready to be entrusted with full citizenship, nor do I think it is safe to leave them open to sue and to be sued in the courts on land questions. I think it would be a bit confusing, because they have not the historical background and long acquaintance with the use of money, and the business knowledge necessary to give them that knowledge. But they have one thing that is found but rarely throughout the world, and that is a genius for form, for design, for pattern, and for various crafts, of basket making, pottery, and worship. They have this instinctive traditional sense of self-government handed down to them for ages, and they are a choice, a precious and unusual thing that should be preserved in this country under as serene conditions as possibly could be granted to them."

Senate Hearings Pages 219-220—Mr. Renshaw: "I have never been in favor of a 10-year possession. I have always been in favor of a 20-year possession, although I believe I can defend a 10-year possession on the theory that I have endeavored to submit that the Government of the United States has been the deceiver, through its Congress and its courts, by representing in effect, by enactments and judicial decrees, to the people of New Mexico, until the theory was changed by the Sandoval decision, that the Indians had the right to transfer their lands, and that they had therefore the liability of losing their lands by adverse possession."

"It must be remembered that there had been no precise legislation by Congress prior to the enabling act of 1910

whereby they attempt to create in themselves a guardianship over the Indians; but they dealt with the Indians, so far as legislation is concerned, as if they were citizens with full power; so that if our people are to suffer then they suffer by reason of the error and misguidance of the courts of the United States."

Senate Hearings Page 246—Statement of Mr. Francis C. Wilson: "Mr. Renehan discussed at great length the law as he thought it should be. Our answer to that is that the Sandoval case settles the law, and that it is a waste of time to discuss legal questions which were involved in that case and which were settled by that case."

The statement that there was no precise legislation concerning these Indians prior to the enabling act is, we think, an erroneous one. When the Supreme Court of the State of New Mexico decided, in the case cited by Mr. Renehan, that the lands of these Indians were subject to taxation, in a test case, that case not appealed to the Supreme Court of the United States, unfortunately; but Congress responded by tacking a rider onto the Indian appropriation act for the succeeding year exempting them from taxation, past, present, and future. I submit, Mr. Chairman, that that was a specific act of Congress whereby Congress announced its attitude of protection and of fostering care over these Indians. They could not pay taxes on their lands and on their property. All their property would have been sold for taxes if it had been made subject to taxation.

Not only that, but the Sandoval case recites a long series of a course of conduct, also legislation, whereby these Indians had received to an extent the same benefits

extended by Congress to other Indians—schools, for instance; the irrigation engineer at Albuquerque, who has charge of that district—there are several States, I think, in the district—etc.

Senate Hearings Page 282—March 25, 1920 Letter to Attorney General from S. Burkhardt: "It seems to me that any suit brought by the Government, if necessary, should be based solely on the lack of authority of the Indians to convey. The Sandoval case in 231 U.S. settles this question beyond controversy in favor of the Government's contention."

APPENDIX G

Evolution of Section 16 of the Pueblo Lands Act

1. *The Bursum Bill*

67th Congress
2nd Session

S. 3855

IN THE HOUSE OF REPRESENTATIVES

September 13, 1922

Referred to the Committee on Indian Affairs

AN ACT

To ascertain and settle land claims of persons not Indian within Pueblo Indian land, land grants, and reservations in the State of New Mexico.

• • •

Sec. 16. That in cases where lands within such grants, or any part or parcel thereof, shall at the trial be shown not to have been held and occupied by the claimants, non-Indian, for the period fixed by section 8 of this Act for the acquiring of title under the provisions hereof, but have been purchased, or acquired by inheritance, used and cultivated, or purchased, or acquired by inheritance, held, occupied, or otherwise used for pastoral purposes under fence, in good faith by the claimant, the court shall make a special finding determining the boundaries of the tract so purchased, acquired, held and occupied, used and cultivated, in good faith, as well as also the value of the land without improvement, and shall report such finding to the Secretary of the Interior, and the claimant, if the Secretary of the Interior shall approve an application made by

the claimant for said land, may purchase the same at the value found by the court, and the purchase price shall be held in trust and expended for the pueblo under such rules and regulations as shall be from time to time prescribed for the benefit of the pueblo within whose grant any such tract of land shall be situated.

2. *The Lenroot Substitute*

67th Congress
4th Session

Calendar No. 1161

S. 3855

[Report No. 1175]

IN THE SENATE OF THE UNITED STATES

April 20 (calendar day, July 20), 1922.

Mr. BURSUM introduced the following bill; which was read twice and referred to the Committee on Public Lands and Surveys.

September 11, 1922

Reported by Mr. BURSUM, without amendment, considered by unanimous consent, read the third time, and passed.

September 13, 1922

Referred to House Committee on Indian Affairs.

November 27, 1922

Returned to Senate and referred to the Committee on Public Lands and Surveys

February 24, 1923

Reported by Mr. LENROOT, with amendments
[Strike out all after the enacting clause and insert the part printed in italic.]

App. 34

A BILL

To ascertain and settle land claims of persons not Indian within Pueblo Indian land, land grants, and reservations in the State of New Mexico.

• • •

Section 13. That if any land adjudged against any claimant be situate among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian land, and the Secretary of the Interior deems it to be in the best interest of the Indians that such parcels so adjudged against the non-Indian claimant be sold, he may with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash, and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 12 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

3. *The Pueblo Lands Act*

68th Congress
1st Session

Calendar No. 522

App. 35

S. 2932

[Report No. 492]

IN THE SENATE OF THE UNITED STATES

March 24 (calendar day, March 25), 1924

Mr. BURSUM introduced the following bill; which was read twice and referred to the Committee on Public Lands and Surveys

April 24 (calendar day, May 3), 1924

Reported by Mr. ADAMS, with amendments

[Omit the part struck and insert the part printed in italic]

A BILL

To quiet the title to lands within Pueblo Indian land grants, and for other purposes.

• • •

Section 16. That if any land adjudged by the court or said lands board against any claimant be situate among lands adjudicated or otherwise determined in favor of non-Indian claimants and apart from the main body of the Indian land, and the Secretary of the Interior deems it to be for the best interest of the Indians that such parcels so adjudged against the non-Indian claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash, and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the

losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated.

4. The Act of May 31, 1933, ch. 45 § 7, 48 Stat. 108

Sec. 7. Section 16 of the Act approved June 7, 1924, is hereby amended to read as follows:

"Sec. 16. That if the Secretary of the Interior deems it to be for the best interest of the Indians that any land adjudged by the court or said Lands Board against any claimant be sold, he may, with the consent of the governing authorities of the pueblo, order the sale thereof, under such regulations as he may make, to the highest bidder for cash; and if the buyer thereof be other than the losing claimant, the purchase price shall be used in paying to such losing claimant the adjudicated value of the improvements aforesaid, if found under the provisions of section 15 hereof, and the balance thereof, if any, shall be paid over to the proper officer, or officers, of the Indian community, but if the buyer be the losing claimant, and the value of his improvements has been adjudicated as aforesaid, such buyer shall be entitled to have credit upon his bid for the value of such improvements so adjudicated."

APPENDIX H

Excerpts From Committee Reports on the different versions of Section 16. (Note—there were no committee reports commenting on Section 16 of the Bursum Bill).

1. The Lenroot Substitute. S. Rep. No. 1175, 67th Cong., 4th Sess. 5 (February 24, 1923):

Under section 13 it is provided that in certain cases lands found to belong to the Indians, but away from the main body of Indian land, may be sold with the consent of the governing authorities of the pueblo involved.

2. The Final Bill. S. Rep. No. 492, 68th Cong., 1st Sess. 10-11 (April 24, 1924):

If any land adjudged by the court or board against any claimant is situate among land adjudicated in favor of non-Indian claimants, apart from the main body of the Indian land, and the Secretary of the Interior deems it to be for the best interests of the Indians that such land be sold, he may with the consent of the governing authorities of the pueblo sell the same to the highest bidder for cash, and, if the buyer be other than the losing claimant, the purchase price shall be used to pay to such losing claimant the adjudicated value of the improvement thereon and the balance to be paid over to the proper officers of the Indian community. If the buyer be the losing claimant, the buyer shall be entitled to have credit upon his bid for the value of his improvements.

3. The Act of May 31, 1933, ch. 45, § 7, 48 Stat. 108; S. Rep. No. 73, 73rd Cong., 1st Sess. 4 (May 15 1933):

The bill amends Section 16 of the act approved June 7, 1924, by removing certain restric-

tions in the sale of lands adjudged to belong to the pueblos. As thus amended, the Secretary of the Interior is authorized to make sales, with the consent of the governing authorities of the pueblos, such sale to be to the highest bidder for cash. This will enable the secretary to sell lands, where deemed advisable; other provisions of law authorize him to buy lands for the pueblos, thus permitting the blocking of lands belonging to the tribes.